

# JUDICIAL TRANSPARENCY AND ETHICS ENHANCEMENT ACT OF 2006

---

## HEARING BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

**H.R. 5219**

JUNE 29, 2006

**Serial No. 109-124**

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

U.S. GOVERNMENT PRINTING OFFICE

28-408 PDF

WASHINGTON : 2006

---

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Internet: [bookstore.gpo.gov](http://bookstore.gpo.gov) Phone: toll free (866) 512-1800; DC area (202) 512-1800  
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

## COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., Wisconsin, *Chairman*

HENRY J. HYDE, Illinois	JOHN CONYERS, JR., Michigan
HOWARD COBLE, North Carolina	HOWARD L. BERMAN, California
LAMAR SMITH, Texas	RICK BOUCHER, Virginia
ELTON GALLEGLY, California	JERROLD NADLER, New York
BOB GOODLATTE, Virginia	ROBERT C. SCOTT, Virginia
STEVE CHABOT, Ohio	MELVIN L. WATT, North Carolina
DANIEL E. LUNGREN, California	ZOE LOFGREN, California
WILLIAM L. JENKINS, Tennessee	SHEILA JACKSON LEE, Texas
CHRIS CANNON, Utah	MAXINE WATERS, California
SPENCER BACHUS, Alabama	MARTIN T. MEEHAN, Massachusetts
BOB INGLIS, South Carolina	WILLIAM D. DELAHUNT, Massachusetts
JOHN N. HOSTETTLER, Indiana	ROBERT WEXLER, Florida
MARK GREEN, Wisconsin	ANTHONY D. WEINER, New York
RIC KELLER, Florida	ADAM B. SCHIFF, California
DARRELL ISSA, California	LINDA T. SANCHEZ, California
JEFF FLAKE, Arizona	CHRIS VAN HOLLEN, Maryland
MIKE PENCE, Indiana	DEBBIE WASSERMAN SCHULTZ, Florida
J. RANDY FORBES, Virginia	
STEVE KING, Iowa	
TOM FEENEY, Florida	
TRENT FRANKS, Arizona	
LOUIE GOHMERT, Texas	

PHILIP G. KIKO, *General Counsel-Chief of Staff*  
PERRY H. APELBAUM, *Minority Chief Counsel*

---

## SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

HOWARD COBLE, North Carolina, *Chairman*

DANIEL E. LUNGREN, California	ROBERT C. SCOTT, Virginia
MARK GREEN, Wisconsin	SHEILA JACKSON LEE, Texas
TOM FEENEY, Florida	MAXINE WATERS, California
STEVE CHABOT, Ohio	MARTIN T. MEEHAN, Massachusetts
RIC KELLER, Florida	WILLIAM D. DELAHUNT, Massachusetts
JEFF FLAKE, Arizona	ANTHONY D. WEINER, New York
MIKE PENCE, Indiana	
J. RANDY FORBES, Virginia	
LOUIE GOHMERT, Texas	

MICHAEL VOLKOV, *Chief Counsel*  
DAVID BRINK, *Counsel*  
CAROLINE LYNCH, *Counsel*  
JASON CERVENAK, *Full Committee Counsel*  
BOBBY VASSAR, *Minority Counsel*

# CONTENTS

JUNE 29, 2006

## OPENING STATEMENT

	Page
The Honorable Howard Coble, a Representative in Congress from the State of North Carolina, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security .....	5
The Honorable Robert C. Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security .....	6
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary .....	7

## WITNESSES

The Honorable Charles Grassley, a U.S. Senator from the State of Iowa	
Oral Testimony .....	1
Prepared Statement .....	3
Mr. Ronald Rotunda, Professor of Law, George Mason University School of Law	
Oral Testimony .....	10
Prepared Statement .....	13
Mr. Arthur Hellman, Professor of Law, University of Pittsburgh School of Law	
Oral Testimony .....	29
Prepared Statement .....	31
Mr. Charles Geyh, Professor of Law, Indiana University School of Law at Bloomington	
Oral Testimony .....	46
Prepared Statement .....	48

## APPENDIX

### MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Robert C. Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security .....	59
Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary .....	60
Letter to the Honorable Howard Coble from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States .....	61



## **JUDICIAL TRANSPARENCY AND ETHICS ENHANCEMENT ACT OF 2006**

**THURSDAY, JUNE 29, 2006**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIME, TERRORISM,  
AND HOMELAND SECURITY  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 11:37 a.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Mr. COBLE. Good morning, ladies and gentlemen. The Committee will come to order.

To begin with, Mr. Scott and I will apologize for our delay. But best-laid plans of mice and men, you know, oft times go awry, and we had a vote.

And, Senator Grassley, the distinguished gentleman from Iowa, I am told that you are on a short leash.

So, Bobby, with your consent, and with the consent of the others, I am going to violate the rules of protocol, Senator, and permit you to give your 5-minute testimony, and then Mr. Scott and I will give our respective opening statements, and we will hear from the other three members, if that is in agreement with everyone.

I am told you are managing a bill on the Senate floor now, Senator. So why don't you proceed and go for 5 minutes, Senator? Then we will resume regular order.

### **TESTIMONY OF THE HONORABLE CHARLES GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Okay. Mr. Chairman, the legislation is the Oman free trade agreement that starts at 11:30, so I accept the opportunity that you have given me to be here to discuss H.R. 5219. I introduced a companion bill in the House, and I am hopeful that we can move forward with this legislation in both bodies.

The Federal judiciary is supposed to be engaged in self-regulation of ethics issues, but ever since I chaired the Senate Judiciary Subcommittee on Courts in the early 1990's, concerns have been raised about compliance with judicial ethics rules and whether the judiciary can adequately police itself.

Concerns about alleged ethics violations, conflicts of interest, and appearances of impropriety continue to be reported in the press.

Now, I don't know whether or not these lapses were intended. I don't know whether these instances were violations of judicial ethics or codes of conduct. But it doesn't look like the judiciary is act-

ing fast enough to show us that judges are crossing all their t's and dotting all their i's or that the rules work as well as they should.

These allegations don't instill much confidence in me, and I am sure they don't instill much confidence in the American people. I know that mistakes happen. But there are enough questions out there for me to conclude that some sort of action is necessary.

So in my mind, the judiciary hasn't done enough to reassure the public that it is doing all it can to address perceived cracks in the system. The bottom line is that no one is above the law. That is presidents or Members of Congress. And our judges aren't either.

And I know they know that. History shows us that the institution of inspector general has been crucial in detecting, exposing and deterring problems within Government. The job of inspector general is to be the first line of defense against fraud, waste and abuse.

In collaboration with whistleblowers, inspectors general have been extremely effective in efforts to expose and correct wrongs. That is why, during my 30 years on Capitol Hill, I have worked hard to strengthen the oversight role of inspectors general.

I rely on I.G.s and whistleblowers to ensure that our tax dollars are spent according to the letter and spirit of the law. And inspector general is just the right kind of medicine that the Federal judiciary needs to ensure that it is complying with every ethic rule.

An independent I.G., one with integrity and courage, will help root out waste, fraud and abuse. And the reality is that if we establish internal controls, those controls can help make sure that these problems don't ever happen.

Now, I know that some people think that there is no need for a judiciary I.G. They believe that the current system of self-policing is adequate. Some believe that they can just legislate certain rules for the judiciary and that that is going to fix the problem.

Legislating is one thing. Ensuring accountability is quite another. The judiciary's current self-policing system is just not up to snuff. There are too many questions about how conflicts and financial interests are reported and how recusal lists are compiled and kept up to date.

There are too many questions as to whether the judiciary's current policy, which I understand is not uniform throughout the court system itself, is as effective as it should be. Transparency can only make the system better and make our judges more accountable to the people.

But there isn't a lot of transparency in our current system. I agree with some of my colleagues that one way to ensure that ethics are being followed is to allow more transparency with respect to judges' financial holdings and potential conflicts.

Improved access to judges' financial information as well as recusal lists will promote transparency and check the judiciary. But beyond that, an independent office of inspector general can do a lot to keep the Federal judiciary on its toes and up to par with standards as expected.

And the proof is in the pudding. The institution of I.G. in various agencies has significantly increased accountability.

Based on their oversight role as well as oversight activities by Congress and the Government Accountability Office, many agencies

have improved internally and have prevented more waste, fraud and abuse from happening.

An inspector general is a simple, common-sense internal control and check on internal impropriety. An internal watchdog also acts as a deterrent for improper activity.

Further, an inspector general's office can do a better job when it has the cooperation of employees who aren't afraid to raise concerns, so that brings about the necessity of strengthening whistleblowers' positions and keeping the public trust.

They step forward, they put their careers and reputations on the line, to just do one thing, to commit truth. And they deserve not to be retaliated against. Providing whistleblower protections to judicial branch employees will help our judiciary function better.

The bill before you is a straightforward bill and I won't go into the details of that, but it is going to ensure a fair and independent judiciary as a critical aspect of our constitutional system of checks and balances and to make sure that they do their job right.

Judges are supposed to maintain an appearance of impartiality. They are supposed to be free from conflicts of interest. And an independent watchdog for the Federal judiciary will help judges comply with all of these requirements.

Whistleblower protection for that branch employees will help keep the judiciary accountable. This bill will not only ensure continued public confidence in our Federal judiciary and keep them beyond reproach, it will strengthen our judicial branch.

So I thank you, Chairman Coble, for the opportunity to be before you. And since I shortcut some of my statements, I would like to have the entire statement put into the record as printed.

[The prepared statement of Mr. Grassley follows:]

PREPARED STATEMENT OF THE HONORABLE CHUCK GRASSLEY, A U.S. SENATOR  
FROM THE STATE OF IOWA

Chairman Coble, it's a pleasure for me to be here today to discuss HR 5219, the Judicial Transparency and Ethics Enhancement Act of 2006. I introduced the companion bill in the Senate. I'm hopeful we can move forward with this legislation, because it'll go a long way in helping restore the American people's trust in our judicial system.

The federal judiciary is supposed to engage in self regulation on ethics issues. But ever since I chaired the Senate Judiciary Subcommittee on Administrative Oversight and the Courts in the early 1990s, concerns have been raised about compliance with the judicial ethics rules and whether the judiciary can adequately police itself on these matters. Concerns about alleged ethics violations, conflicts of interests, and appearances of impropriety by judges continue to be reported by the press.

Now, I don't know whether or not these lapses were intentional. I don't know whether these instances were violations of the judicial ethics rules, the ethics statute, or the judicial code of conduct. But it doesn't look like the judiciary is acting fast enough to show us that judges are crossing all their "T's and dotting all their "I's, or that the rules work as well as they should. I'm sorry to say that these allegations don't instill much confidence in me, and I'm sure that they don't instill much confidence in the American people. I know that mistakes happen, but there are enough questions out there for me to conclude that some sort of action is necessary. In my mind, the judiciary hasn't done enough to reassure the public that it is doing all that it can to address what are perceived to be cracks in the system.

The bottom line is that no one is above the law. The President isn't above the law. Congressmen and Senators aren't above the law. And our judges aren't above the law either.

The facts do show us that the institution of the Inspector General has been crucial in detecting, exposing and deterring problems within our government. The job of the Inspector General is to be the first line of defense against fraud, waste and abuse.

In collaboration with whistleblowers, Inspectors General have been extremely effective in their efforts to expose and help correct wrongs.

That's why, during my 30 years on Capitol Hill, I've worked hard to strengthen the oversight role of Inspectors General throughout the federal government. I've come to rely on IGs and whistleblowers to ensure that our tax dollars are spent according to the letter and spirit of the law. And when that doesn't happen, we in Congress need to know about it and take corrective action.

I truly believe that an Inspector General is just the right kind of medicine that the federal judiciary needs to ensure that it is complying with the ethics rules. An independent IG, one with integrity and courage, will help root out waste, fraud and abuse. And the reality is that if we establish internal controls, those controls can help make sure that these problems don't happen in the first place.

Now, I know that some people think that there is no need for a judiciary IG. They believe that the current system of self policing is adequate. In addition, some believe that we can just legislate certain rules for the judiciary, and that will fix the problems that we are seeing. But, legislation is one thing; ensuring accountability is another.

The judiciary's current self policing system is just not up to snuff. There are too many questions about how conflicts and financial interests are reported and how recusal lists are compiled and kept up to date. There are too many questions as to whether the judiciary's current policy—which I understand is not uniform throughout the courts—is as effective as it can be. Transparency can only make the system better and make our judges more accountable to the people. But there isn't a lot of transparency with the current system. I agree with some of my colleagues that one way to ensure that the ethics rules are being followed is to allow more transparency with respect to a judge's financial holdings and conflicts. Improved access to judges' financial information, as well as judges' recusal lists, would promote transparency and place a check on the judiciary.

But beyond that, an independent office of Inspector General within the judicial branch can do a lot to keep the federal judiciary on its toes and up to par with the standards that are expected of it.

And the proof is in the pudding. The institution of the IG in various agencies has significantly increased accountability to the public. Based on their oversight role, as well as oversight activity by the Congress and the GAO, many agencies have improved internally and have prevented more waste, fraud and abuse from happening. An internal Inspector General is a simple, commonsense internal control and check on internal impropriety. An internal watchdog also acts as a deterrent for improper activity.

Further, an Inspector General's Office can do a better job when it has the cooperation of employees who aren't afraid to raise concerns about internal misconduct. Whistleblowers help strengthen and keep the public trust. Whistleblowers who step forward and put their careers and reputations on the line in defense of the truth deserve to be protected, not retaliated against. Providing whistleblower protections to judicial branch employees will only help our judiciary function better.

The Judicial Transparency and Ethics Enhancement Act is a straightforward bill. It would establish an Office of Inspector General for the judicial branch. The IG would be appointed by the Chief Justice of the Supreme Court, in consultation with the House of Representatives and the Senate. The IG's responsibilities would include conducting investigations of possible judicial misconduct, investigating waste fraud and abuse, and recommending changes in laws and regulations governing the federal judiciary. The bill would require the IG to provide the Chief Justice and Congress with an annual report on its activities, as well as refer matters that may constitute a criminal violation to the Department of Justice. In addition, the bill establishes whistleblower protections for judicial branch employees.

Ensuring a fair and independent judiciary is critical to our Constitutional system of checks and balances. Judges are supposed to maintain an appearance of impartiality. They're supposed to be free from conflicts of interest. An independent watchdog for the federal judiciary will help judges comply with the ethics rules and promote credibility within the judicial branch of government. Whistleblower protections for judiciary branch employees will help keep the judiciary accountable. The Judicial Transparency and Ethics Enhancement Act will not only ensure continued public confidence in our federal courts and keep them beyond reproach, it will strengthen our judicial branch.

Again, I want to thank Chairman Coble and his colleagues for allowing me to testify on this important bill.



Mr. COBLE. Without objection, it will be done. And we appreciate you being with us, Senator. We would be glad for you to stay, but I understand you are on a short leash.

Senator GRASSLEY. Thank you very much.

Mr. COBLE. Good morning again, ladies and gentlemen. We welcome you all to this important hearing before the Subcommittee on Crime, Terrorism, and Homeland Security to examine H.R. 5219, the "Judicial Transparency and Ethics Enhancement Act of 2006," introduced by the Chairman of the House Judiciary Committee, Mr. Sensenbrenner.

Integrity and accountability within our Federal courts is a critically important issue for all of us and has been for some time. In 2001, as Chairman of the Courts, the Internet, and Intellectual Property Subcommittee, I chaired a hearing on the operation of the Judicial Conduct and Disability Act of 1980 and the relevant recusal statutes.

The 1980 act created a decentralized framework of self-regulation whereby complaints of judicial misconduct are reviewed by the chief judge of the relevant circuit or, in more serious cases, judicial councils within the circuit.

We learned from the hearing that the complaint process was largely unpublicized and that transparency issues persisted, particularly with regards to conflicts of interest.

As a follow-up to the 2001 hearing, Representative Howard Berman and I wrote to Chief Justice William Rehnquist offering several recommendations to improve the application of the 1980 act and the recusal statutes. The Judicial Conference responded to two of those three recommendations in its September 2002 report.

In recent years, there have been a disturbing number of reports that a number of Federal judges—and I think I will say a limited number of Federal judges, not that many—who are continuing to violate ethical rules, including disclosure requirements, or are engaging in judicial misconduct.

Equally troubling is the lackluster response from the circuits in self-policing this behavior. It is clear that we can no longer rely on—in my opinion, it is clear that we can no longer rely on the 1980 act, and I share the Chairman's concern on this issue.

H.R. 5219 establishes an independent inspector general within the judicial branch who is appointed by and reports directly to the chief justice of the United States.

The inspector general will conduct investigations of complaints of judicial misconduct; conduct and supervise audits; detect and prevent waste, fraud and abuse; and recommend changes in laws or regulations governing the judicial branch.

The creation of an inspector general is not a radical idea. Inspectors general exist in over 60 executive agencies, boards and commissions, and Congress as well. They shine a light on the internal operations of these entities in order to prevent fraud and improve efficiency and accountability.

There is no reason, it seems to me, why the judicial branch should be exempt from this type of oversight.

As Chairman Sensenbrenner emphasized when he introduced the bill, the inspector general will not have any authority or jurisdiction over the substance of a judge's opinion—that is, the merits of

the case. Judicial independence in rendering decisions is a critical component of the separation of powers that must not be tampered with.

However, unethical behavior and misconduct must be taken seriously to maintain the public's confidence in the judiciary.

And before I recognize the distinguished gentleman from Virginia, and on a personal note, I have only known one member of the U.S. Supreme Court personally, and that was the late Chief Justice Rehnquist. And I found him to be a superb jurist and a superb gentleman.

I have known several district and circuit court judges, all of whom are superb. But there are some who miss the mark. We have Members of Congress who miss the mark. I guess there is no profession or vocation exempt from that.

And I think that probably is what Mr.—I recall having read, Mr. Scott, of reckless extravagance of some judges in furnishing their chambers and their courtrooms, elaborate spending of taxpayers' money.

These sort of things, I think, can probably be examined thoroughly and deliberately with the presence of an I.G.

Having said that, I look forward to hearing the testimony from our distinguished panel.

And I am pleased to recognize the distinguished gentleman from Virginia, and also welcome the Ranking Member of the full Committee, the distinguished gentleman from Michigan, Mr. Conyers.

Mr. Scott?

Mr. SCOTT. Thank you. Mr. Chairman, before we get started, in reviewing this bill, I was just wondering how the Crime Subcommittee got jurisdiction.

Mr. COBLE. Rather than give you a runaround, I will admit I don't know.

Mr. SCOTT. Moving right along.

Mr. COBLE. But it was handed—the baton was handed to us, so we ran with it.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, I am pleased to join you in convening the hearing on H.R. 5219, the “Judicial Transparency and Ethics Enhancement Act of 2006.”

Mr. Chairman, I favor Congress conducting regular oversight over the administrative operations of the courts through reports, hearings and avenues of communication.

I am in favor of Congress authorizing, but not requiring, the Judicial Conference to appoint an inspector general or other such officials to assist in their efforts to rein judges in who do not follow the rules and to develop reports to be sent to Congress and elsewhere that the conference might direct.

But I am not in favor of Congress requiring the appointment of a judiciary I.G. in whose appointment Congress has a say and who reports to Congress as we might see fit, according to the bills that we may direct.

I direct that such a congressionally influenced position would clearly offend traditional notions of separation of powers and comity between the legislative and judicial branches.

We don't check with the executive or judicial branches when we select officers for the House, and it is insulting to think that they should have to consult with us when a judicial officer is appointed.

Moreover, Mr. Chairman, I believe that the creation of such a position is unnecessary. If we are dissatisfied with the way the judiciary is addressing judicial discipline and other matters, we should notify the chief justice, as you, Mr. Chairman, and Ranking Member Berman did with Chief Justice Rehnquist when you were Chairman of the Courts Subcommittee.

Mr. Chairman, you could give Chief Justice Roberts an opportunity to respond to any questions that we may have. Granted that the reports of judges taking and not reporting lavish, privately financed trips and of judges not reporting conflicts of interest as required, as well as failing to recuse themselves as appropriate, those reports are disturbing.

While these matters require the judicial conference's attention, as well as our attention in an oversight capacity, there are a number of approaches available to Congress to satisfy itself that these issues are being appropriately addressed by the judiciary short of establishing a congressionally directed and selected judiciary inspector general.

There is evidence that the Judicial Conference is addressing the issues, including the indications in a letter dated yesterday to this Subcommittee. More specific information is desired—if more specific information is desired, perhaps a letter to the chief justice requesting an update on the conference's progress would be more appropriate.

The judicial branch is certainly not the only branch in Government with disturbing reports of inappropriately—of inappropriate finance—privately financed trips and conflicts of interest.

There are continue to be a number of such reports regarding Members of Congress, despite actions taken by Congress over the years to address the problem, including the establishment of an inspector general.

While the Congress has an oversight responsibility to see to it that the public resources it makes available to other branches are expended in a publicly accountable and proper manner, the oversight of ethics of individual employees of those branches is better left to the branches themselves, short of the necessity of use of Congress' impeachment powers.

With these reservations, Mr. Chairman, I look forward to the testimony of our witnesses for their insight in the issues that will be raised by H.R. 5219.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

And I say to my friend from Virginia I have just been advised that the bill initially was, in fact, assigned to the Courts Subcommittee, but upon request it was suggested that our Subcommittee preside over the hearing. So belatedly, I have an answer to your question, Mr. Scott.

The chair is now pleased to recognize the distinguished Ranking Member, the gentleman from Michigan.

Mr. CONYERS. Thank you. Chairman Coble and Ranking Member Scott, I came by for this Committee hearing because it seems to me

that, once again, we are considering proposed legislation that attacks the independence of the judiciary.

Despite the fact that the Nation's founders meant for the judiciary to be free of partisan pressure and immune from political whims, this Administration and this Congress have pushed measures that subject courts to excessive oversight and strip them of their powers.

What we would do here is create an inspector general for the judiciary authorizing the I.G. with subpoena powers to investigate misconduct by any Federal judge and recommend action by Congress or the Justice Department.

The I.G. would also be empowered to recommend changes to laws affecting the judiciary. This is unwise. For the first time, an extrajudicial body would oversee the courts.

Under the current regime, the courts themselves review allegations of misconduct and forward evidence of impeachable offenses, if there are thought to be any, to the House Judiciary Committee.

In addition, if congressional proponents of an inspector general believe that serious abuses are occurring in the judiciary, we can hold—open investigations on the subject myself. No such congressional inquiries have been held.

This is telling of the motivation, to me, behind this legislation. It appears that an inspector general has been proposed as a means of intimidating judges into political compliance. And that is my view. This would not be the first of such attempts, and I hope that it would possibly be the last.

Now, the late Chief Justice Rehnquist appointed the judicial—created the Judicial Conduct and Disability Act Study Committee. And it was created to make a comprehensive study of the act governing judicial conduct and its administration, with a final report to Chief Justice Roberts expected very shortly.

And so there have been a number of steps that have been taken by the courts to continue to police themselves, and I hope that we will develop a fuller understanding about the sensitivity of having an I.G. over the Federal courts itself.

And I thank you for the opportunity to enter into this discussion with you.

I thank the distinguished gentleman. Thank you, Mr. Conyers.

Gentlemen, it is the practice of the Subcommittee to swear in all witnesses appearing before it, so if you would, please, stand and raise your right hand.

[Witnesses sworn.]

Mr. COBLE. Let the record show that each of the witnesses answered in the affirmative.

You may be seated.

We have been joined as well by the distinguished gentleman from Massachusetts, Mr. Delahunt.

Good to have you with us, Bill.

Mr. DELAHUNT. Thank you very much.

Mr. COBLE. We have four distinguished witnesses, one of whom has already departed, with us today. And I will dispense with the introduction of Senator Grassley.

Our second witness is Mr. Ronald Rotunda, George Mason University Foundation Professor of Law at the George Mason Univer-

sity School of Law, a school that is well-known, Professor, to my North Carolina people, since you all eliminated us from the basketball activity earlier this year.

Professor Rotunda has authored and co-authored several books on ethics and constitutional law, including the most widely used course book on legal ethics, "Problems and Materials on Professional Responsibility."

He has been a member of the publications board of the American Bar Association Center for Professional Responsibility since 1994, is a past member of the ABA Standing Committee on Professional Discipline, and served as liaison to the ABA Standing Committee on Ethics and Professional Responsibility.

Professor Rotunda is a graduate of both Harvard College and the Harvard University School of Law.

Our second witness is Mr. Arthur Hellman, who we have seen before.

Good to have you back, Professor.

Mr. HELLMAN. It is good to be back, sir. Thank you.

Mr. COBLE. Sally Ann Semenko Endowed Chair and professor of law at the University of Pittsburgh School of Law. Professor Hellman is one of the Nation's leading academic authorities on the Ninth Circuit Court of Appeals where he served on the Appeals Evaluation Committee from 1999 to 2001.

He is the author of numerous articles and books, including "Federal Courts: Cases and Materials on Judicial Federalism and The Lawyering Process," which he co-authored in 2005.

Prior to joining the University of Pittsburgh Law faculty, he was deputy executive director of the Commission on Revision of the Federal Court Appellate System. Professor Hellman received his B.A. from Harvard College and a J.D. from the Yale University School of Law.

Our final witness today is Mr. Charles Geyh, professor of law and Charles L. Whistler Faculty Fellow at the Indiana University School of Law at Bloomington. Professor Geyh is the author of "When Courts and Congress Collide: The Struggle for Control of America's Judicial System," and is currently a co-reporter of the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct.

He has previously served as Director of the American Judicature Society Center for Judicial Independence, Reporter to the ABA Commission on Separation of Powers and Judicial Independence, and Counselor to the House Judiciary Committee.

Professor Geyh received his undergraduate and law degrees from the University of Wisconsin.

Now, I apologize to you all for the delayed introduction, but I think it is important for all of us to be familiar with the impressive credentials that witnesses bring before this Committee, and that is why I went into some detail.

Gentlemen, we are on a short leash as well. There will be a vote on the House floor, I am suspecting probably within 30 minutes to 45 minutes. So as you all have previously been requested, if you could confine your testimony to on or about 5 minutes.

And when you see the amber light appear on the panel in front of you, that is your warning that you have a minute to go before

the ice becomes thin on which you are skating, but Mr. Scott and I will not be unduly harsh with you. But if you could comply with that 5-minute rule, we would be appreciative.

And, Professor Rotunda, why don't we start with you?

**TESTIMONY OF RONALD ROTUNDA, PROFESSOR OF LAW,  
GEORGE MASON UNIVERSITY SCHOOL OF LAW**

Mr. ROTUNDA. Yes. Thank you very much. It is a pleasure to be here.

I am pleased to offer this testimony on behalf of H.R. 5212, the proposed inspector general act. I think it offers modest reform that will keep our judiciary independent, because nobody favors a dependent judiciary, and will keep our judiciary accountable, because no one favors a judiciary that is above the law.

I agree with Professor Geyh. In his written testimony, he says that this proposed bill will address "a *bona fide* problem." And he adds, "If the judiciary is unwilling to reform itself in the teeth of evidence that further reform is necessary," he says then Congress should take stronger measures.

I disagree. I think Congress can take stronger measures now, though, of course, it should have a dialogue with Justice Breyer and the Committee he is on.

Two general reactions have accompanied this bill. I think first people ask why we have waited so long to have an inspector general for the court. It exists throughout the executive branch. There are now 57 statutory inspectors general, plus others done by regulation.

The duties are to prevent fraud, waste, abuse and misconduct, report violations of civil rights or civil liberties. The House of Representatives has its own inspector general. When Speaker Gingrich became speaker, he ordered an outside audit of the House, and outside firms conducted it.

One engages in such conduct not because you think there is evil afoot, but just to assure everyone that things are fine. Outside auditors perform that function well. Inspector generals do that as well. I really don't see the argument that inspector generals should not at least have an auditing function over the courts.

The proposed inspector general act does not—it does important things, but it is not what some of its detractors would suggest. It would conduct and supervise audits and investigations, prevent fraud and detect waste, recommend changes in law and regulations governing the judicial branch—anyone can do that, including the I.G.—and then conduct investigations relating to the judicial branch, including possible misconduct that may require oversight or other action by Congress.

Very little would do that, but some things, like proposed changes in the law you could see coming up periodically. These proposals are salutary. They will protect—the inspector general will protect judges from frivolous or false charges. No organ of Government should be above the law.

The second reaction to this proposal is also surprising. Some people greet the law the way Dracula would greet garlic. They shy away. Justice Ginsberg is quoted in the papers as saying she finds the proposal "a really scary idea."

I don't think the sky is falling. I think opponents do not attack the bill that is actually proposed but one that they fear or imagine. It is not going to limit judicial dependence. If it did, I wouldn't testify in favor of the bill.

I think it will strengthen judicial independence, because it gives people greater faith that if there are problems the inspector general will deal with them, and that the—what is becoming more common character assassinations of Federal judges the inspector general could say “I have investigated that there is no problem”—be done with it.

There is actually a plea for statutory change by the judges themselves. I refer to this in my written statement, which is longer, but it is the opinion of the Judicial Conference on April 28 of 2006.

The majority held that under the Federal statute it had no jurisdiction to proceed with discipline because the chief circuit judge of the Ninth Circuit and the Judicial Conference of the Ninth Circuit did not follow the mandatory statutory procedures.

The majority said that we can do nothing because the other judges violated the statute. And then the majority of judges requested that Congress enact new legislation to solve this problem.

I checked; nobody from Congress that I know of has gotten any requests from the judges for the statutory change. But this Committee or these judges asked for it. I think this legislation is an appropriate response.

Judge Winter's dissent in that case, joined by Judge Dimmick, warned that allowing the judges to police themselves is not working. He said, and I am quoting now, “A self-regulatory procedure suffers from the weakness that many observers will be suspicious that complaints against judges will be dissolved, will be disfavored. The Committee's decision in this case can only fuel such suspicions.”

I don't—I think in 99 percent of the cases against judges are dismissed anyway, and I think under an inspector general it will be about the same percentage. But one or two may come out differently. That will be important.

And even more important, we will be satisfied that the other 99 percent are properly dismissed, because the inspector general would be the one agreeing with the courts.

The judge later added that the required statutory procedure was not followed. The disposition of the present matter is therefore not a confidence-builder. Sadly, he is correct.

I think it is time for a change. When we use a system and it doesn't work, our response should not be to invoke a catch-phrase. Our response should be to create a system that will work.

Now, if the Federal courts had an inspector general, we would have more openness. People would not assume that judges are above the law. I have no doubt that the great majority of cases are without merit. The inspector general will give us assurance that the law is followed.

Professor Steven Lubet of Northwestern University has pointed out—quoting again—“Federal judges have more insulation than anyone in American political life. A judge with life tenure needs less protection, not more than an ordinary citizen.”

Now, under the proposed law, the chief justice appoints the inspector general. He is appointed by the chief. Congress has no power to remove anybody except by impeachment. The Senate doesn't confirm the chief justice—the inspector general. That is just left up to the chief justice.

The inspector general reports to the chief justice. It is true, he files a report with Congress. That doesn't mean he is under the thumb or reports to Congress any more than the President of the United States is under the thumb of Congress because he is required by the Constitution to give a state of the union report every year.

It is a fairly modest bill. Maybe there is some disputes about language that can be worked out. But I think it is going to be a salutary role for the courts. It will increase their independence and not decrease it.

Thank you very much.

[The prepared statement of Mr. Rotunda follows:]



PREPARED STATEMENT OF RONALD D. ROTUNDA

THE SUBCOMMITTEE ON CRIME, TERRORISM & HOMELAND SECURITY  
on H.R. 5219

*The Judicial Transparency and Ethics Enhancement Act of 2006*

TESTIMONY OF  
RONALD D. ROTUNDA  
UNIVERSITY PROFESSOR AND PROFESSOR OF LAW  
George Mason University School of Law

June 29, 2006

**Introduction**

I am pleased to offer this testimony on behalf of the proposed Inspector General legislation.<sup>1</sup> H.R. 5219, *The Judicial Transparency and Ethics Enhancement Act of 2006*, offers modest reforms that will help keep our judiciary independent (no one favors a dependent judiciary) and will help keep our judiciary accountable (because no one favors a judiciary that is above the law).

---

<sup>1</sup> For my current resume, please see <http://mason.gmu.edu/~rrotunda/>. As requested in Chairman Sensenbrenner's letter of 20 June 2006, I am attaching a copy of my resume to this letter.

In brief, I joined the University of Illinois faculty in 1974 after serving as assistant majority counsel for the Watergate Committee. I joined the George Mason faculty in 2002. I co-authored the most widely used course book on legal ethics, *Problems and Materials on Professional Responsibility* (Foundation Press, 9th ed. 2006) and am the author of a leading course book on constitutional law, *Modern Constitutional Law* (West Publishing Co., 7th ed. 2003). I am the coauthor of, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thompson, 4th ed., 2006) (jointly published by the ABA and Thompson Publishing) (with John Dzienkowski), and also the co-author (with John Nowak) of the five volume *Treatise on Constitutional Law* (Thompson Publishing, 3rd ed. 1999), and a one volume *Treatise on Constitutional Law* (Thompson Publishing, 7th ed. 2004). I have authored several other books and more than 200 articles in various law reviews, journals, and newspapers in this country and in Europe. State and federal courts at every level have cited these books and articles more than 1000 times. The New Educational Quality Ranking of U.S. Law Schools (EQR) ranked Professor Rotunda as the eleventh most cited of all law faculty in the United States. See [http://www.utexas.edu/law/faculty/blociter/rankings02/most\\_cited.html](http://www.utexas.edu/law/faculty/blociter/rankings02/most_cited.html).

Two reactions have accompanied this bill:

FIRST, people wonder why we have waited so long to propose an Inspector General for the courts. An Inspector General already exists for a host of federal agencies. The Inspector General's activities include auditing protecting whistle-blowers, and increasing confidence in the public that government officials spend federal money and resources properly spent and follow federal law. Search the U.S. statutes in Westlaw™ for "Inspector General" and you will find 560 documents. Search, instead, for "Inspector General" under the federal case law, and you will find 3,278 documents, as of 23 June 2006. The concept of "Inspector General" is well-known in the court system, but judges, oddly enough, are immune from it.

There is, for example, an Inspector General for Iraq Reconstruction.<sup>2</sup> The Coalition Provisional Authority, the U.S. overseer of Iraq from June 2003 to June 2004, established a program review board, an independent judiciary and inspector generals in each agency to fight corruption.<sup>3</sup> There is an Inspector General for the Pentagon. Like other inspector generals, he investigates complaints, clears people wrongly accused in the press, or reaffirms the wrongdoing in other cases.<sup>4</sup> There is an Inspector General for the Department of Homeland Security, so that

---

<sup>2</sup> AP, *Audit Hits Former U.S. Authority in Iraq*, WASHINGTON TIMES, January 31, 2005, <http://www.washingtontimes.com/functions/print.php?StoryID=20050130-094529-3103r>

<sup>3</sup> *Id.*

<sup>4</sup> Rowan Scarborough, *General Cleared in Church Speeches Case*, WASHINGTON TIMES, August 20, 2004, <http://www.washingtontimes.com/national/20040820-125028-3534r.htm>.

"The Pentagon inspector general did not substantiate complaints that Lt. Gen. William G. Boykin misused his Army uniform, violated travel regulations or used improper speech when he addressed 23 church  
Footnote continued on next page.

when issues surfaced regarding what may have been improper conduct, the Inspector General investigated. The “passenger on Northwest Flight 327 who blew the whistle on the incident, said she felt ‘vindicated and relieved’ after learning the investigation had been ongoing since July.”<sup>5</sup>

The House of Representatives has created its own Inspector General.<sup>6</sup> The House Committee on Standards handles ethical complaints. When House Speaker Gingrich assumed that office, he ordered an audit by the House, which outside firms conducted. One engages in

---

groups on his views on faith and warfare. Investigators also found Gen. Boykin did not improperly accept speaking fees.

“But the IG report did find that Gen. Boykin violated three rules: He should have gotten clearance from public affairs on the content of his speech; he should have told audiences that his remarks were his own views, and not the Pentagon’s; and he should have filled out a form showing that one group reimbursed him \$260 for travel.”

<sup>5</sup> Audrey Hudson, *Passengers Describe Flight As A Terrorist Dry Run* WASHINGTON TIMES, April 27, 2005, <http://www.washingtontimes.com/national/20050426-105951-8168r.htm>.

<sup>6</sup> <http://clerk.house.gov/legisAct/legisProc/rules/rule2.html> . See also, <http://www.house.gov/IG/> . Rules of the House of Representatives, Rule II: Other Officers And Officials, part 6: Office of Inspector General provide:

“(a) There is established an Office of Inspector General.

“(b) The Inspector General shall be appointed for a Congress by the Speaker, the Majority Leader, and the Minority Leader, acting jointly.

“(c) Subject to the policy direction and oversight of the Committee on House Administration, the Inspector General shall only— (1) conduct periodic audits of the financial and administrative functions of the House and of joint entities; (2) inform the officers or other officials who are the subject of an audit of the results of that audit and suggesting appropriate curative actions; (3) simultaneously notify the Speaker, the Majority Leader, the Minority Leader, and the chairman and ranking minority member of the Committee on House Administration in the case of any financial irregularity discovered in the course of carrying out responsibilities under this clause; (4) simultaneously submit to the Speaker, the Majority Leader, the Minority Leader, and the chairman and ranking minority member of the Committee on House Administration a report of each audit conducted under this clause; and (5) report to the Committee on Standards of Official Conduct information involving possible violations by a Member, Delegate, Resident Commissioner, officer, or employee of the House of any rule of the House or of any law applicable to the performance of official duties or the discharge of official responsibilities that may require referral to the appropriate Federal or State authorities under clause 3(a)(3) of rule XI.”

such conduct not because he assumes that there is evil afoot, but because he wants to assure everyone that things are fine. Outside auditors perform that function. Inspectors General do so as well.

The Inspectors General home page advises that there are now 57 statutory Inspectors General.<sup>7</sup> The duties of the Inspector General are, in general, to “report waste, fraud, or abuse” and to “report violations of civil rights or civil liberties.”<sup>8</sup>

The proposed Inspector General for the Courts would:

- conduct investigations of matters relating to the Judicial branch (other than the Supreme Court), including possible misconduct of judges and proceedings under Chapter 16 of title 28, United States Code, that may require oversight or other action by Congress;
- conduct and supervise audits and investigations;
- prevent and detect waste, fraud and abuse; and
- recommend changes in laws or regulations governing the Judicial Branch.

---

<sup>7</sup> <http://www.igncl.gov/>.

<sup>8</sup> <http://www.usdoj.gov/oig/>. See also, *id.* “The Office of the Inspector General (OIG) conducts independent investigations, audits, inspections, and special reviews of United States Department of Justice personnel and programs to detect and deter waste, fraud, abuse, and misconduct, and to promote integrity, economy, efficiency, and effectiveness in Department of Justice operations.”

These purposes are salutary. No judge should fear them. An Inspector General will protect judges from frivolous or false charges. Indeed, one wonders why it has taken so long to create an Inspector General for the Courts. No organ of Government should be above the law.

The SECOND reaction to this proposed law is more surprising. There are those who greet this law the way Dracula would greet garlic; they vigorously shy away. The newspapers quote Justice Ruth Bader Ginsburg as saying of a proposal to create an inspector general to monitor the ethical behavior of federal judges: "That's a really scary idea." Ginsburg said, "It sounds to me very much like the Soviet Union was .... That's a really scary idea."<sup>9</sup> "The judiciary is under assault in a way that I haven't seen before."<sup>10</sup>

However, the sky is not falling. If I thought that the proposed, *Judicial Transparency and Ethics Enhancement Act of 2006*, would erode judicial independence, I would not testify in favor of the bill. Opponents do not attack the bill that that is actually proposed but one that they imagine. Frankly, judicial independence will remain if *The Judicial Transparency and Ethics Enhancement Act of 2006* becomes law. Indeed, the bill will strength judicial independence because it will give people greater faith that if there are problems, the Inspector General will deal with them and not sweep them under the rug.

#### **Structural Provisions in Our Constitution Protect the Independence of Each Branch of Government**

---

<sup>9</sup> Gina Holland, AP, *Ginsburg: Congress' Watchdog Plan 'Scary'*, LAS VEGAS SUN, May 2, 2006, <http://www.lasvegassun.com/sunbin/stories/bw-scolas/2006/may/02/050208919.html>.

<sup>10</sup> E.g., Tony Mauro, *Justices Fight Back*, USA TODAY, June 20, 2006, at p. 13A, <http://www.usatoday.com/printedition/news/20060620/opiede20.art.htm>.

The Framers created structural protections in the Constitution to protect the independence of each branch, but they put no branch above the law. For Congress, the Framers authorized, *e.g.*, each House to be the Judge of its Elections.<sup>11</sup> They also authorized each House to punish its Members for disorderly conduct, and (if there is a super-majority) to even expel a Member for disorderly conduct.<sup>12</sup> And, of course, the Constitution creates a special “Speech or Debate” privilege of each Member.<sup>13</sup>

The Framers did not create a similar set of immunities for the Judges in Article III courts. The Framers did not make the judges the judge of their own appointments; the judges cannot “expel” a fellow judge; and, of course, there is no privilege analogous to the “Speech or Debate” privilege. Instead, Framers guaranteed judicial independence in a different way: the judges that they would have lifetime appointments and Congress could not reduce their salaries.<sup>14</sup>

It never occurred to the Framers that the judges should be, for example, immune from audit.

Similarly, it never occurred to the Framers that the independence of the judicial branch meant that judges are or should be immune from criticism. If they were immune, law reviews

---

<sup>11</sup> U.S. Constitution, Article I, §5, clause 1.

<sup>12</sup> U.S. Constitution, Article I, §5, clause 2.

<sup>13</sup> U.S. Constitution, Article I, §6, clause 1: “. . . and for any Speech or Debate in either House, they shall not be questioned in any other Place.”

<sup>14</sup> U.S. Constitution, Article III, §1, clause 1.

would be out of business. We all have the free speech right to criticize judicial decisions, just as judges have the right to criticize each other (or Congress) in their speeches and judicial opinions.

Nor does independence mean that judges are above the law. The purpose of the Inspector General is to protect judges, by providing a ready answer to criticism that they are not following the law,<sup>15</sup> and to protect the judicial system, by providing a structure to deal with valid complaints.

Under the proposed legislation, judges will be able to respond that the Inspector General has investigated and found the complaints to be fruitless. And if the complaint is valid? Then the judges will know that there is a problem, and that it needs correcting. The proposed Inspector General “will not have any authority or jurisdiction over the substance of a judge’s opinions.”<sup>16</sup> The proposed law would not interfere with judges’ independence to write their opinions.

#### **The Judicial Plea for Statutory Changes**

Let me furnish a recent example of a an opinion that both makes the case for reform, and pleads for statutory changes. I refer to the *Opinion of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders*, 2006 Westlaw 1344908 (U.S. Judicial

---

<sup>15</sup> See Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code* (The Howard Lichtenstein Lecture in Legal Ethics), \_\_ HOFSTRA LAW REVIEW \_\_ (2006)(forthcoming).

<sup>16</sup> Chairman F. James Sensenbrenner, April 27, 2006, <http://judiciary.house.gov/media/pdfs/judgeIGintro42706.pdf>.

Conference April 28, 2006).<sup>17</sup> Judge Dolores K. Sloviter, joined by Judges Pasco M. Bowman II and Barefoot Sanders, wrote the majority opinion. Judge Ralph K. Winter, Jr., joined by Judge Carolyn R. Dimmick, dissented.

The majority opinion held that under the federal statute, 28 U.S.C. § 351, *et seq.*, it had no jurisdiction to proceed with discipline because the Chief Circuit Judge of the Ninth Circuit, and the Judicial Council of the Ninth Circuit did not follow the *mandatory* statutory procedures. The majority said that the “chief judge may avoid review by the Judicial Conference (and by definition our committee) by the simple expedient of failing to appoint a special committee under § 353 [of 28 U.S.C.] and instead dismissing a complaint under § 352(b).”<sup>18</sup> *The majority of the judges requested that Congress enact new legislation to solve this problem.*<sup>19</sup>

It hardly presumptively unconstitutional for Congress to accept this judicial invitation and merely amend the various statutes at issue. The proposed Inspector General legislation would be an appropriate response.

This judicial request for congressional help is the most recent chapter in a dispute that started in 2003, when a lawyer filed a judicial misconduct complaint against Federal Judge

---

<sup>17</sup> The opinion is reprinted and available on the web at, <http://www.uscourts.gov/library/circuitcouncilopinions.pdf>.

<sup>18</sup> 2006 WL 1344908 \*3.

<sup>19</sup> 2006 WL 1344908 \*3: “we believe that *additional legislation* expanding the scope of the Conference’s (and, by delegation, this Committee’s) jurisdiction is necessary . . . .” See, e.g., Pamela A. MacLean, *Panel Says Judge’s Ethics Case Not Handled Properly 9th Circuit Chief Failed To Appoint A Committee*, 28 NATIONAL L.J. 6, at col. 1: “Alleged mishandling of a 2003 judicial misconduct complaint against veteran Los Angeles federal judge Manuel L. Real prompted the federal judicial discipline committee to suggest that Congress expand the committee’s authority to review such complaints.”



Manuel Real. The complaint alleged that Judge Real had improperly seized a bankruptcy case from another judge in order to aid a woman whose probation he was overseeing. The federal judicial discipline committee ruled that it did not have the power to sanction Judge Real because the Chief Judge of the Ninth Circuit had improperly investigated the complaint.

Judge Ralph Winter's dissent (joined by Judge Dimmick) warned that allowing judges to police themselves is not working. The intentions are valid — the judiciary wanted to police itself, out of respect for an independent judiciary — but the result is a system that does not satisfy the legitimate expectations of the public, for the judiciary is not policing itself:

“The judicial misconduct procedure is a self-regulatory one. It is self-regulatory *at the request of the judiciary* in a legitimate effort to preserve judicial independence. A self-regulatory procedure suffers from the weakness that many observers will be suspicious that complainants against judges will be disfavored. *The Committee's decision in this case can only fuel such suspicions.*”<sup>20</sup>

Later, the judge added:

“*The required statutory procedure was not followed.* The complaint was dismissed without any discussion by the Chief Circuit Judge or the Council majority of the facts admitted by the District Judge accused of an *improper ex parte* contact. The admitted facts would be regarded by some, if not most,

---

<sup>20</sup> 2006 WL 1344908 \*11 (emphasis added) (Dissenting Statement of Judge Ralph K. Winter, with whom the Judge Carolyn R. Dimmick joins).

professional observers as establishing just such a contact. The Committee rules that it has no power to review the Council's decision *because the statutory procedures were not followed* by the Chief Circuit Judge and Council. *The disposition of the present matter is therefore not a confidence builder.*"<sup>21</sup>

It is time for a change. When we use a system and it does not work, our response should not be to invoke a shibboleth or catch-phrase. Our response should be to create a system that will work.

Let me summarize, briefly, the facts involving Judge Manuel Real, who has often been the subject of critical appellate rulings.<sup>22</sup> U.S. District Judge Manuel Real decided that he would personally supervise the probation of one Deborah M. Canter. She had pled guilty in April 1999 to one count of loan fraud and three counts of making false statements. She was 42 at the time.<sup>23</sup>

---

<sup>21</sup> *In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders*, 2006 WL 1344908, \*12 (emphasis added) (Dissenting Statement of Judge Ralph K. Winter, with whom the Judge Carolyn R. Dimmick joins).

<sup>22</sup> *In re Yagman*, 796 F.2d 1165, 1188 (9th Cir.1986) (case involving Judge Real, where Ninth Circuit reversed the sanctions and remanded for reassignment to another judge), discussed in THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 144 (Foundation Press, 4th ed. 1987).

*Standing Committee on Discipline of U.S. District Court for Central District of California v. Yagman*, 55 F.3d 1430 (9th Cir. 1995) (Ninth Circuit reversed disciplinary proceedings against lawyer who made statements criticizing Judge Real).

<sup>23</sup> Deborah Cantor's lawyer "said that he had 'absolutely zero evidence'" of any improper relationship between [the judge] and Ms. Canter, but was 'suspicious' because Ms. Canter was a 'cute girl' who projected a 'waif' persona that was appealing. At the time he thought that perhaps [the judge] had become aware of her divorce and imminent eviction in the course of one of her probation visits." Quoted in, *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1189 (9th Cir. 2005)(Kozinski, J., dissenting).

Two months before she pled guilty, she had had separated from her husband (Gary Canter), who moved out of the house, which they had rented. Deborah Canter continued to live there. The owner of the house was a trust, which Gary's parents had established.

Deborah Canter continued to live in this house but stopped paying rent. In October 1999, Alan Canter, the property's trustee, filed suit, seeking to evict her and collect \$5,000 in back rent. Shortly before her eviction, she personally delivered a letter asking Real "for his help in preventing her eviction." Deborah Canter told her lawyer's secretary the letter had "worked." Deborah Canter's own lawyer said he was "shocked" because it was a "complete no-no going to a judge secretly without talking to the other side."<sup>24</sup>

Real acknowledged meeting with Canter<sup>25</sup> (when the lawyers for the other party were *not* present), justifying his actions by claiming that he believed her legal representation was inadequate. However, he never held a hearing on this issue; he simply asserted it. Moreover, *federal* bankruptcy courts do not have authority to determine whether parties in *state* court proceedings were adequately represented by their counsel.

---

<sup>24</sup> E.g., *In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders*, 2006 WL 1344908, \*4 (U.S. Jud. Conf. 2006)(dissent); *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1190 (9th Cir. 2005)(dissent); Henry Weinstein, *Complaint Against Judge Has Broader Ramifications*, L.A. TIMES, May 7, 2006, [http://www.latimes.com/news/local/la-mc-real7may07.1.102251\\_story?coll=la-headlines-california](http://www.latimes.com/news/local/la-mc-real7may07.1.102251_story?coll=la-headlines-california).

<sup>25</sup> See discussion of ex parte conversations in Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions*, 2001 U. ILL. L. REV. 611, 612 (2001).

When the trustee filed motions to evict Cantor, Real denied them. When asked why, Judge Real curtly responded, “Just because I said it.”<sup>26</sup>

Judge Real’s “orders were not merely lacking in lawful authority, they were based on *ex parte* communications from the debtor for whose benefit those orders were entered.”<sup>27</sup>

When Judge Schroeder, Chief Judge of the Ninth Circuit, summarily dismissed an ethics complaint against Judge Manuel Real, the Ninth Circuit’s 10-member Judicial Council sent the matter back to her for further disposition. The judges said: “A judge may not use his authority in one case to help a party in an unrelated case.”<sup>28</sup> On remand, Judge Schroeder again dismissed the complaint, apparently finding that there was nothing improper.

The Judicial Council decided not to “upset that factual finding,”<sup>29</sup> but Judge Schroeder was not supposed to make any factual findings. First, the Chief Judge did not conduct an evidentiary hearing. Second, under the federal statute<sup>30</sup> and court rules,<sup>31</sup> her authority is limited

---

<sup>26</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1184 (9th Cir. 2005) (Kozinski, J., dissenting) (quoting for the transcript).

<sup>27</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1188 (9th Cir. 2005) (Kozinski, J., dissenting). It is well established that judges may not exercise judicial power based on secret or *ex parte* communications from one of the parties to the dispute. *United States v. Thompson*, 827 F.2d 1254, 1258-59 (9th Cir.1987). See also, RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* §§ 10.3-98 to 10-3.10 (Thompson-West, 3d ed. 2005); THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* 682-90 (Foundation Press, 9th ed. 2006).

<sup>28</sup> Judicial Council Order (Dec. 18, 2003) at 5-6, quoted in, *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1187 (9th Cir. 2005) (Kozinski, J., dissenting).

<sup>29</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1181.

<sup>30</sup> “The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.” 28 U.S.C. § 352(a).

to determining whether there is credible evidence of misconduct, and she may dismiss the complaint only if credible evidence is entirely lacking. She was not supposed to make any findings of fact, so one wonders why judges would defer to another judge's actions that neither the federal statute nor the court rule authorized.

A panel of judges on the Ninth Circuit demanded that Judge Real acknowledge his misconduct but ruled that “[w]e are satisfied that adequate corrective action has been taken such that there will be no re-occurrence of any conduct that could be characterized as inappropriate.”<sup>32</sup> In one of the two dissents, Judge Kozinski complained:

“Unfortunately, the majority’s exiguous order seems far more concerned with not hurting the feelings of the judge in question. But our first duty as members of the Judicial Council is not to spare the feelings of judges accused of misconduct. It is to maintain public confidence in the judiciary by ensuring that substantial allegations of misconduct are dealt with forthrightly and appropriately. This the majority has failed to do.”<sup>33</sup>

---

<sup>31</sup> See 9th Cir. Misconduct R. 4.

<sup>32</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179 (9th Cir. 2005). The panel of judges were Alarcón, Kozinski, Kleinfeld, McKeown and W. Fletcher, Circuit Judges, and Ezra, Levi, McNamee, Strand and Winnmill, District Judges.

No judge signed the “order,” which was the opinion denying any remedy. Ezra, Chief District Judge, filed an opinion concurring in part and dissenting in part. Kozinski, Circuit Judge, filed dissenting opinion. Winnmill, District Judge, filed a dissenting opinion.

<sup>33</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1198 (9th Cir. 2005)(Kozinski, J., dissenting).

The Judicial Conference of the United States referred the matter to a 5-judge disciplinary committee, which concluded (3 to 2) that it could not act because Chief Judge Schroeder failed to convene a special committee. It asked for additional legislation to deal with this issue.

The 2-person dissent explained that two facts were “indisputable” —

“First, the record would support *a finding of misconduct* in the form of an *ex parte contact* resulting in a judicial ruling. Second, the *mandatory statutory procedures regarding judicial misconduct petitions were not followed by either the Chief Circuit Judge or the Judicial Council of the Ninth Circuit.*”<sup>34</sup>

The majority of judges were unwilling to act, and asked that the statute be amended. The various dissenters were dismayed that there was no discipline of the judge, that the court’s “self-regulatory procedure” fuel suspicions that the judges will disfavor investigating their own, and that the “*disposition of the present matter is therefore not a confidence builder.*”<sup>35</sup>

Sadly, the dissenters are correct: “*disposition of the present matter is therefore not a confidence builder.*” The majority is also correct that Congress must change the statute. The Inspector General legislation would be an appropriate response.

---

<sup>34</sup> *In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders*, 2006 WL 1344908, \*4 (U.S. Jud. Conf. 2006) (Winters, J., dissenting, joined by Dimmick, J.) (emphasis added).

<sup>35</sup> 2006 WL 1344908 \*11-\*12 (emphasis added) (Dissenting Statement of Judge Ralph K. Winter, with whom the Judge Carolyn R. Dimmick joins).

In the meantime, Judge Real's actions permitted Deborah M. Canter to live rent-free for three years, costing her creditors \$35,000 in rent and thousands in legal costs.<sup>36</sup>

### Conclusion

The great majority of complaints against federal judges suffer the same fate as the complaint against Judge Real. The are dismissed. More than 99% of the complaints are dismissed. I assume that that figure would change hardly at all if the federal courts had an Inspector General, because the very great majority of judges are honest and hard-working. But, a few would be investigated and those investigations would increase confidence in the judiciary. Right now, the discipline process is conducted largely in secret.<sup>37</sup>

Even when the process is public, as was eventually the situation in the Judge Real case, one does not know what is going on without a great deal of investigation. The majority opinion in the decision, *In re Opinion of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders*, 2006 Westlaw 1344908 (U.S. Judicial Conference April 28, 2006)<sup>38</sup> manages to talk about the case without ever mentioning the name of the judge one who is the subject of the complaint! This Opinion is really an appeal from the Ninth Circuit opinion, but it is not listed that way, so one does not know that, from reading the majority opinion, which

---

<sup>36</sup> Henry Weinstein, *Complaint Against Judge Has Broader Ramifications*, L.A. TIMES, May 7, 2006, <http://www.latimes.com/news/local/la-me-real7may07.1.102251.story?coll=la-headlines-california>.

<sup>37</sup> Henry Weinstein, *Complaint Against Judge Has Broader Ramifications*, L.A. TIMES, May 7, 2006, <http://www.latimes.com/news/local/la-me-real7may07.1.102251.story?coll=la-headlines-california>.

<sup>38</sup> The opinion is reprinted and available on the web at, <http://www.uscourts.gov/library/circuitcouncilopinions.pdf>.

never gives the citation to *In re Complaint of Judicial Misconduct*, 425 F.3d 1179 (9th Cir.2005).

One has to search to find out what is going on.

If the federal courts had an Inspector General, we would have more openness and people could not assume that judges are above the law. I have no doubt that the great majority of cases are without merit, but when the process is conducted in secret, we cannot be sure. An Inspector General will give us that assurance. As Professor Steven Lubet of Northwestern University has pointed out, “Federal judges have more insulation than anyone in American political life. A judge with life tenure needs less protection, not more, than an ordinary citizen.”<sup>39</sup>

---

<sup>39</sup> Quoted in Henry Weinstein, *Complaint Against Judge Has Broader Ramifications*, L.A. TIMES, May 7, 2006, <http://www.latimes.com/news/local/la-me-real7may07.1.102251.story?coll=la-headlines-california>.



Mr. COBLE. Thank you, Professor Rotunda.  
Professor Hellman?

**TESTIMONY OF ARTHUR HELLMAN, PROFESSOR OF LAW,  
UNIVERSITY OF PITTSBURGH SCHOOL OF LAW**

Mr. HELLMAN. I thank you, Mr. Chairman.

You know, Mr. Chairman, as I sit here this morning, it is impossible not—for me not to think back to that hearing which you have already mentioned that you chaired in November 2001 on the operation of the judicial misconduct statutes.

If at that hearing you had asked me whether any substantial modifications were required in the existing arrangements that govern judicial discipline and judicial disqualification, I would have said no.

But three recent developments suggest a different conclusion today. First, there is the unfortunate episode that has already been mentioned of the misconduct complaint against Judge Manual Real of the Central District of California.

Professor Rotunda in his statement has described that episode in some detail, and I will not retrace that ground myself. What seems clear is that the episode has revealed a gap in the procedures for considering complaints against Federal judges. And again, Professor Rotunda has described that gap.

Well, you might say that is just one episode, but a single widely publicized episode can create grave public doubt about the effectiveness and even the legitimacy of the process.

The episode also reveals a lack of transparency. Although a special Committee has now been appointed, the order creating the Committee cannot be found in any of the places where you would expect to find it.

The second set of developments involves judicial disqualification and the conflict of interest statutes. At the 2001 hearing there was substantial evidence that raised questions about some judges'—and as you have properly said, some judges'—compliance with the laws governing disqualification.

And you, Mr. Chairman, as you have already mentioned—you and Ranking Member Berman sent a bipartisan letter to Chief Justice Rehnquist urging the Judicial Conference to require all Federal courts to adopt the Iowa model for posting conflict lists on court Web sites.

The Judicial Conference did not follow that suggestion. And now, in 2006, history repeats itself with disturbingly similar allegations, this time against Judge Payne and Judge Boyle. As Yogi Berra might say, it is *deja-vu* all over again. And the consequences are felt not just by those particular judges, but by the judiciary as a whole.

Finally, there is the Breyer Committee that—that we have heard about here already. And Professor Geyh suggests that Congress should wait for the committee's report rather than proceed to consider legislation now.

Now, ordinarily, I would agree with that, because I think we can learn a lot from such a distinguished group of judges. But we have been waiting for quite some time. And that committee was formed more than 2 years ago.

And since then, as far as I am aware, we haven't heard a peep. There have been no hearings, no announcements inviting people to express their views or give their experiences with the process, and of course, no report and no recommendations for improving the operation of the misconduct statutes.

Under those circumstances, I think it is reasonable here in this Subcommittee to consider the proposal that is on the table, namely H.R. 5219.

Now, as has already been discussed, that bill would create an inspector general for the Federal judiciary. And I think that the sponsors of that bill have taken great pains to design this new mechanism in a way that respects the status of the judiciary as a co-equal and independent branch of Government. And that point is developed at some length in my testimony.

But with my limited time here, what I would like to do is to offer a couple of suggestions for fine-tuning the bill, because I do think it can be improved to address some of the concerns.

My own principal concern is that the proposed new section 1023(1) of title 28 does not adequately explain how the functions of this new office would be integrated into the existing statutory structure for dealing with complaints against judges.

In particular, the bill could be read as authorizing the I.G. to carry out his or her investigations simultaneously with those of the chief judge, the circuit council or even the Judicial Conference of the United States. And that kind of duplication of effort would be wasteful, it would be inefficient, and it would be confusing.

Now, I do think that there is a pretty simple fix for that. I have outlined it in my testimony, and I hope we can talk a little bit about it here. But basically, it would make clear that the I.G.'s responsibilities begin after the circuit has completed its work.

Another suggestion I have is that the bill should make more explicit the responsibility of the I.G. for promoting transparency within the judiciary in matters involving misconduct or possible conflicts of interest. There is a lot of work to be done there in transparency. I hope we have a chance to talk about those and the other suggestions I have offered.

And once again, I appreciate the chance to express my views today. Thank you.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR D. HELLMAN

**Statement of**

**Arthur D. Hellman**

*Sally Ann Semenko Endowed Chair  
University of Pittsburgh School of Law*

**House Committee on the Judiciary  
Subcommittee on Crime, Terrorism, and Homeland Security**

**HEARING ON**

**H.R. 5219**

**JUDICIAL TRANSPARENCY AND  
ETHICS ENHANCEMENT ACT OF 2006**

**June 29, 2006**

Arthur D. Hellman  
University of Pittsburgh School  
of Law  
Pittsburgh, PA 15260  
Telephone: 412-648-1340  
Fax: 412-648-2649  
E-mail: hellman@law.pitt.edu

**Statement of  
Arthur D. Hellman**

Mr. Chairman, Ranking Member Scott, and Members of the Subcommittee:

Thank you for inviting me to express my views at this hearing on H.R. 5219, the Judicial Transparency and Ethics Enhancement Act of 2006. I support the bill because recent developments have demonstrated that there are gaps and inadequacies in the present system of judicial accountability, and H.R. 5219 is a reasonable means of closing the gaps and dealing with the inadequacies. I do have a few suggestions for fine-tuning the bill, primarily to assure that the new mechanisms will be fully integrated into the existing statutory structure.

Before elaborating on these points, I will say a few words by way of personal background. I am a professor of law at the University of Pittsburgh School of Law, where I was recently appointed as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 30 years. During that period, I have written numerous articles, books, and book chapters dealing with various aspects of the federal judicial system. Last year, I published (with Dean Lauren Robel of the Indiana University School of Law) a new casebook, *FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS*. Of particular relevance to this bill, I testified at a hearing of the Subcommittee on Courts, the Internet and Intellectual Property in November 2001 on "Operation of the Judicial Misconduct Statutes." Subsequent to that hearing, Chairman Coble, joined by Ranking Member Berman, introduced the bipartisan Judicial Improvements Act of 2002, which became law as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273.

### **I. The Need for New Legislation**

The federal judicial system is the envy of civilized nations throughout the world. Its stature rests in large part on two essential features: judicial independence and judicial integrity. For the most part, judicial independence and judicial integrity reinforce another. In one respect, however, there is a tension between the two. Because human beings are fallible, it is generally accepted that some mechanism is required to identify and correct instances in which particular judges have strayed from the norms of “good behavior.” But if the process is too bureaucratic, too heavy-handed, or too quick to move to formal adjudication, it poses a threat to the judges’ independence.

Over the years, Congress has taken an active role in striking an appropriate balance, and the results of its work are reflected in several provisions of Title 28. Section 144 establishes procedures for assuring that no case is heard by a judge who “has a personal bias or prejudice” against or in favor of any party. Section 455 lays down elaborate rules to govern the disqualification of judges and avoid conflicts of interest. Most important, Chapter 16 creates a detailed set of procedures for handling complaints against judges and taking appropriate action in instances of judicial misconduct.

Chapter 16 originated in the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (to give it its full name). The 1980 law, initially codified as section 372(c) of the Judicial Code, established a new set of procedures for judicial discipline and vested primary responsibility for implementing them in the federal judicial circuits. In essence, Congress opted for a regime that has aptly

been described as one of “decentralized self-regulation.”<sup>1</sup> Minor changes were made in later years, notably in the Judicial Improvements Act of 1990. More substantial revisions were made in 2002 when Congress enacted the bipartisan Judicial Improvements Act of 2002, cosponsored by Chairman Coble and Ranking Member Berman of the Subcommittee on Courts, the Internet and Intellectual Property. It was the 2002 law that gave the judicial misconduct provisions their own chapter in the United States Code, Chapter 16.

If, at the hearing that preceded the enactment of the Judicial Improvements Act of 2002, Chairman Coble had asked me whether any substantial modifications were required in the existing statutory arrangements, I would have said “No.” However, three recent sets of developments suggest a different conclusion today.

**A. A gap in the misconduct statutes**

In April 2006, the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders handed down a 3-2 decision holding that, under present law, the Judicial Conference of the United States has no authority to review a Circuit Judicial Council order dismissing a complaint of judicial misconduct, even if the Chief Judge of the circuit should have appointed a special investigating committee but failed to do so.<sup>2</sup> The complaint involved an allegation of misconduct by District Judge Manuel Real of the Central District of California. Professor Rotunda, in his statement today, has described that decision in some detail, and I will not retrace that ground here.

---

<sup>1</sup> See Jeffrey N. Barr & Thomas E. Willgang, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Pa. L. Rev. 25, 29 (1993) (hereinafter “FJC Study”).

<sup>2</sup> In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct, --- F.3d ---, 2006 WL 1344908 (Apr. 28, 2006) [hereinafter Judicial Conference Committee Opinion].

One might respond by saying that a single high-profile episode, however lamentable, does not prove that the system does not work. Moreover, subsequent to the Judicial Conference ruling, Chief Judge Schroeder issued an order appointing a special committee to investigate the charges against Judge Real;<sup>3</sup> thus, one might argue that the system *did* work, albeit after much delay and several detours.<sup>4</sup> However, I do not find these responses persuasive. For one thing, a single widely publicized episode can create grave public doubt about the effectiveness and even the legitimacy of the process. Judge Ralph K. Winter, Jr. (joined by Judge Carolyn R. Dimmick) made this point in his dissent from the Judicial Conference Committee decision:

The judicial misconduct procedure is a self-regulatory one. It is self-regulatory at the request of the judiciary in a legitimate effort to preserve judicial independence. A self-regulatory procedure suffers from the weakness that many observers will be suspicious that complainants against judges will be disfavored. The Committee's decision in this case can only fuel such suspicions.<sup>5</sup>

Beyond this, one really cannot say that, from a systemic perspective, “all’s well that ends well.” Although the order establishing the special committee was issued on May 23, it has not yet been posted on the Ninth Circuit’s web site. Nor is it

---

<sup>3</sup> In re Complaint of Judicial Misconduct (Judicial Council of the Ninth Circuit, May 23, 2006) (Nos. 04-89030 and 05-89097).

<sup>4</sup> Technically, the order of May 23 did not direct the special committee to investigate the allegations contained in the original complaint against Judge Real; rather, it initiated an investigation of two later complaints. But Chief Judge Schroeder stated explicitly that the investigation “should cover all matters reasonably within the scope of the ‘facts and allegations’ of complaint No. 05-89097, including the nature and extent of any ex parte contact with [Judge Real], as well as any related matters raised by the Judicial Council in its remand to me after my first dismissal of [the initial complaint against Judge Real].” (Emphasis added.)

<sup>5</sup> Judicial Conference Committee Opinion, *supra* note 2, at \*11.

available on Westlaw or Lexis. Transparency is an important part of accountability, but the interest in transparency has not been well served.

**B. Unnecessary controversies over failure to recuse**

The second set of developments involves judicial disqualification and the conflict-of interest statutes. During the past year, blogs and advocacy groups have accused two district judges (James H. Payne of the Eastern District of Oklahoma and Terrence W. Boyle of the Eastern District of North Carolina) of failing to recuse themselves from cases involving companies in which they held investments. Both judges had been nominated to their respective courts of appeals; one has already withdrawn as a nominee, and the other has been subjected to harsh criticism.

I take no position on whether the accusations are well founded. My concern, rather, is that the controversies have been harmful to the judiciary as well as to the particular judges – and that the controversies could easily have been avoided.

In February 2002, Chairman Coble of the Subcommittee on Courts, the Internet and Intellectual Property, joined by Ranking Member Berman, wrote to Chief Justice Rehnquist in his capacity as presiding officer of the Judicial Conference of the United States. The purpose of their letter was to offer recommendations to the Judicial Conference for measures that would “both improve the operation of Article III courts and instill even greater public confidence in [the work of the courts].”<sup>6</sup> One of the principal suggestions was that the Judicial Conference should “require all federal courts to adopt the Iowa model” for posting “conflict lists” on court web sites. The letter began by

---

<sup>6</sup> The letter is set forth in its entirety in H.R. Rep. 107-459 at 16-18 (May 14, 2002).



describing allegations of failure to recuse that are disturbingly similar to the ones lodged in 2006 against Judge Payne and Judge Boyle:

You will recall the *Kansas City Star* articles from 1998 that detailed alleged instances of judges adjudicating cases in which they held financial interests. The Community Rights Counsel, which had a representative testify at our hearing, also has published literature that raises questions in some minds about judges' compliance with the laws governing disqualification. While the hearing did not reveal that the practice was systemic or based on a conscious desire by individual judges to influence the value of personal holdings, the damage that such stories or other publications inflict on the reputation of the courts is self-evident.

The letter continued by explaining the nature of the problem and how the "Iowa model" offered a "template for the rest of the federal judiciary":

Part of the problem, according to journalists and other interested parties, is that judicial disclosure forms filed pursuant to the Ethics in Government Act are difficult to obtain. The Northern and Southern Districts of Iowa have responded to this situation in a manner that might serve as a template for the rest of the federal judiciary. Both Districts post "conflict lists" on their respective web sites. The benefits of this practice are manifest: the likelihood increases that genuine conflicts will be flagged earlier in the litigation process; journalists and advocacy groups will have greater access to relevant information that will enable them to monitor judicial compliance with conflict-of-interest requirements; the lists can be more easily updated than annual hard-copy disclosure filings; and the legitimate privacy and safety interests of judges [are] not compromised (since the lists only indicate that a judge is recused from cases involving specific corporations, and nothing more).

Consistent with this precedent, we urge the Conference to require all federal courts to adopt the Iowa model. Specifically, each court should implement and monitor procedures for assuring that judges regularly inform the appropriate Clerk of Court of those changes in stock holdings and other financial holdings which would necessitate revisions to the appropriate conflict list. Judges should also be encouraged to work with their brokers or other financial advisors to ensure that the relevant portfolio information is available in a timely manner to the Clerk for such purposes.

The Judicial Conference adopted two other suggestions in the Coble-Berman letter (including one about posting links to complaint forms), but as far as I am

aware, the Conference never acted on the suggestion about posting conflict lists.<sup>7</sup> Neither Judge Payne nor Judge Boyle has adopted the Iowa model. If they had done so, the controversies might have been avoided.

It is regrettable that the Judiciary on its own has not taken the steps that would make it much easier to assure compliance with the disqualification requirements of 28 USC § 455. This institutional failure is a good reason for taking another look at the system.

### **C. Silence from the Breyer Committee**

In May 2004, after consulting with Chairman Sensenbrenner, Chief Justice Rehnquist established a committee, chaired by Justice Stephen Breyer, “to evaluate how the federal judicial system has implemented the Judicial Conduct and Disability Act of 1980.” That, of course, was more than two years ago. As far as I am aware, the Breyer Committee has not issued any reports. It has not held any public hearings, nor has it extended any formal invitations for public comment.

If the Breyer Committee had issued a report – even an interim report – the Subcommittee might be able to consider some alternative suggestions for legislation to improve the operation of the judicial misconduct statutes. At the least, the Subcommittee would have the benefit of the considered views of the judiciary, based on experience, of the effectiveness of current procedures. But we

---

<sup>7</sup> In September 2002, the Judicial Conference “[urged] every federal court to include a prominent link on its website to its circuit’s forms for filing complaints of judicial misconduct or disability and its circuit’s rules governing the complaint procedure.” The Conference also “[encouraged] chief judges and judicial councils to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services.” The Conference noted that these suggestions came from “two members of Congress.”

do not have either of those things. And in their absence, it makes sense to consider H.R. 5219.

## II. The Virtues of H.R. 5219

The basic thrust of H.R. 5219 is to create an “Office of Inspector General for the Judicial Branch.” The bill lists several duties that the Inspector General would perform; the most important of these is to “conduct investigations of matters pertaining to the Judicial Branch, including possible misconduct in office of judges and proceedings under chapter 16 of this title, that may require oversight or other action within the Judicial Branch or by Congress.” Other functions include conducting audits and preventing and detecting waste, fraud, and abuse.

Although one member of the Supreme Court has described the proposed Inspector General as “scary idea,” that characterization ignores the many important virtues of H.R. 5219. Indeed, I think the sponsors of the bill have taken great pains to design the new mechanism in a way that respects the status of the Judiciary as a coequal and independent branch of government.

First, the new Office would be established *within the Judicial Branch*.<sup>8</sup> That placement in itself goes a long way to addressing concerns about judicial independence. I would have grave concerns if Congress were to authorize investigations of the judiciary by a new entity that was part of the Legislative or Executive Branches. H.R. 5219 avoids those concerns.

Second, the bill provides for *appointment* of the Inspector General *by the Chief Justice of the United States* “after consultation with the majority and

---

<sup>8</sup> The legislation provides that the Office is established “for” the Judicial Branch, and the provisions are in Title 28. It might be desirable to make explicit that the Office would be established as part of the Judicial Branch.

minority leaders of the Senate and the Speaker and minority leader of the House of Representatives.” This too provides substantial reassurance that the new system will respect the independence of the judiciary. I suspect that the Chief Justice would appoint a sitting or retired Article III judge, thus reinforcing the independence of the Office from Congress or the Executive.

Third, Chairman Sensenbrenner, the principal sponsor of the bill, has emphasized that “this independent Inspector General *will not have any authority or jurisdiction over the substance of a judge’s opinions.*”<sup>9</sup> (Emphasis added.) He explained: “Judicial independence of opinions is a sacred foundation of our constitutional form of government of checks and balances and separation of powers that must not be tampered with.” Nothing in the bill contradicts this assurance; however, to quell the fears that one witness today has expressed, it would be desirable to include similar language in the legislation itself.

Fourth, H.R. 5219 excludes the Supreme Court of the United States from its coverage. In this respect it differs from the companion legislation introduced by Senator Grassley as S. 2678. I believe that the House bill is substantially preferable on this score. It would be unseemly, at the least, for a subordinate officer within the Judicial Branch (or elsewhere) to investigate Justices of the Supreme Court. Nor has any need been shown for such a radical measure.

Finally, the Inspector General would have no power to discipline or penalize any judge. The structure of the bill makes clear that if the Inspector General does identify misconduct by a judge, the Inspector General would have to refer the matter to other entities “within the Judicial Branch or ... Congress” for action.

---

<sup>9</sup> News Advisory (Apr. 27, 2006)  
<http://judiciary.house.gov/media/pdfs/judgeIntro42796.pdf> (quoting Chairman Sensenbrenner).

With all of these limitations and safeguards, there is no reason to describe H.R. 5219 as “scary” or an “assault” on the judiciary. On the contrary, what H.R. 5219 does is to create an entity within the Judicial Branch whose primary task would be to strengthen judicial ethics and enhance transparency. Under existing arrangements, those tasks are, in different ways, the responsibilities of every member of the judiciary. But all too often, when everyone is responsible, no one is accountable. By designating a “point person” within the Judiciary with special responsibility for matters of ethics and disclosure, H.R. 5219 would substantially promote accountability.

### **III. Fine-Tuning H.R. 5219**

Although H.R. 5219 avoids many of the pitfalls that some people might have feared in legislation of this kind, no bill is perfect, and in this section of my statement I offer some suggestions for fine-tuning H.R. 5219.

#### **A. The role of the Inspector General in misconduct proceedings**

My principal concern is that the proposed new § 1023(1) of Title 28 [Page 2, lines 14-22] does not adequately explain how the functions of the new Office would be integrated into the existing statutory structure for dealing with complaints against judges. In particular, the bill could be read as authorizing the Inspector General to conduct an investigation of alleged judicial misconduct simultaneously with the Chief Judge of a circuit, the circuit Judicial Council, or the Judicial Conference of the United States. This duplication of effort would be wasteful, inefficient, and confusing.

Fortunately, there is a simple fix: to avoid these unfortunate consequences, the legislation should make clear that the Inspector General’s responsibilities would not begin until after the Chief Judge and the Circuit Judicial Council have

completed their work. This in turn suggests that the Inspector General's duties should be divided into two categories, one for cases in which a special committee has been appointed, and one for cases (like the *Real* matter) in which the Chief Judge has dismissed the complaint and the Circuit Judicial Council has denied review.

### **1. Special-committee cases**

Chapter 16 already sets forth detailed procedures for cases in which a special committee has been appointed under 28 USC § 353(a). Among other things, the special committee must file "a comprehensive written report" with the Judicial Council of the circuit. Under § 354, the Council has a variety of options after receiving that report. But whatever the Council does, an aggrieved complainant or judge "may petition the Judicial Conference of the United States for review" of its action.

In that setting, I suggest that the Inspector General can best serve as an arm of the Judicial Conference, performing a role akin to that of a Special Master to the United States Supreme Court in original-jurisdiction cases. The Inspector General can engage in further investigation, prepare materials for consideration by the Conference (or its Committee to Review Circuit Council Conduct), or formulate recommendations.

### **2. Other cases**

A different – and more robust – role is called for when no special committee has been appointed. As the majority judges in the *Real* decision emphasized, current law provides that when the Circuit Chief Judge dismisses a complaint, there is one level of review, and only one – by the Circuit Council. If the Circuit Council denies the petition for review, that denial "shall be final and conclusive

and shall not be judicially reviewable on appeal or otherwise.” (See 28 USC § 352(c).)

One of the reasons for this preclusion provision is that Congress did not want to burden the Judicial Conference of the United States with the obligation to review hundreds of petitions, the overwhelming majority of which would be plainly frivolous. But the consequence is that review is also precluded in the occasional case that warrants it. As the majority of the Judicial Conference Committee acknowledged, “a chief judge may avoid review by the Judicial Conference ... by the simple expedient of failing to appoint a special committee under § 353 and instead dismissing a complaint under § 352(b).” The dissenters put the matter even more strongly: “[D]enial of review [when no special committee has been appointed] means that chief circuit judges and circuit judicial councils are free to disregard statutory requirements. In fact, by disregarding those requirements, they may escape review of their decisions.”

Creating the Office of Inspector General provides an excellent opportunity to correct the flaw revealed by the *Real* decision, without requiring the Judicial Conference (or its committee) to review scores or hundreds of frivolous applications. My suggestion is that the Inspector General should serve as a gatekeeper. Congress would amend § 352(c) to authorize the Judicial Conference to review Council action when no special committee has been appointed – but only if the Inspector General allows the proceeding to go forward. This could be done through a procedure analogous to the “certificate of appealability” required for habeas corpus appeals under 28 USC § 2253(c).

If the Judicial Conference decides to review a matter, the Inspector General would carry out the necessary investigations and perhaps prepare findings of fact

and recommendations for action. In undertaking these tasks the IG would of course have the various powers conferred by the new section 1024.

\*\*\*

I have not attempted to work out all the details, but I believe that the arrangement outlined here: (a) would enhance the effectiveness of Judicial Conference review; and (b) would provide the “confidence builder” that the dissenters in the *Real* decision sought; but (c) would not impose undue burdens on the Conference.

**B. Other possible revisions**

I have a few other modest suggestions for improving the bill. First, I cannot help thinking that some of the over-the-top reaction to the proposal is a function of the label “Inspector General.” It is true, as Professor Rotunda points out, that “a host of federal agencies” have Inspectors General; yet there seems to be something about the name in the judicial context that makes the position seem overbearing or even hostile. Perhaps the new officer could be designated as the Special Counsel to the Judicial Conference of the United States.

Second, as mentioned earlier, I suspect that the Chief Justice might well want to appoint a sitting judge – perhaps a judge with a background in law enforcement – to serve as the Inspector General. Appointment of an Article III judge would have the benefit of giving special independence and strength to the fledgling position. For that reason, it would be desirable to amend the bill to include whatever provisions are necessary to make this possible, along the lines of existing provisions governing the Director of the Federal Judicial Center.

Third, it might be desirable to make more explicit the responsibility of the Inspector General for promoting transparency in matters involving misconduct or



possible conflicts of interest. For example, the IG might be tasked with implementing and monitoring a Web-based system for posting judges' conflict lists and keeping them up to date. Similarly, the IG might be given the responsibility for assuring that orders disposing of misconduct complaints are made available to the public in accordance with the Judicial Conference's 2002 directive.<sup>10</sup>

Finally, as already suggested, there is much to be said for making clear in the statute itself that the Inspector General would have no authority over the substance of judicial decisions. I note, however, that the fine-tuning of § 1023(1) suggested above would go a long way toward confining the Inspector General's authority to matters that are within the scope of Chapter 16.

#### **IV. Conclusion**

Some of the negative reaction to H.R. 5219 seems to be driven by the assumption that because some of the bill's proponents have criticized "judicial activism," the bill itself must be aimed at punishing judges for their judicial decisions. While it is of course true that "context matters," I have taken H.R. 5219 for what it purports to be – an effort to strengthen the ability of the judiciary to assure compliance with the statutes governing misconduct and disqualification. From that perspective, creation of an Inspector General can be a positive step. And with the modest suggestions offered here, the new Office could be even more effective in preserving the integrity as well as the independence of the judiciary.

---

<sup>10</sup> See *supra* note 7.

Mr. COBLE. Thank you, Professor.  
Mr. Geyh?

**TESTIMONY OF CHARLES GEYH, PROFESSOR OF LAW,  
INDIANA UNIVERSITY SCHOOL OF LAW AT BLOOMINGTON**

Mr. GEYH. Mr. Chairman, I would like to begin on a personal note. I served as counsel to Bob Kastenmeier in the early 1990's on the Courts Subcommittee and remember you fondly as someone who regardless of whether you agreed with Mr. Kastenmeier and regardless of what went on in that hearing room were always a consummate gentleman.

I admired it then. I admire it now. It makes it a real privilege to be here.

Mr. COBLE. Well, you will recall I served as—in the minority under Chairman Kastenmeier. He was indeed a superb Chairman of this Subcommittee and, I am told, still lives in the area. Is that correct?

Mr. GEYH. He does indeed. I saw him as recently as a week ago.

Mr. COBLE. Thank you.

Mr. GEYH. The one thing I would like to add to this hearing that I think the other two witnesses have not is a little bit of context. These are troubled times for the relationship between judges and legislators.

We have a number of legislators who are very concerned about the extent to which, you know, certain judges have decided cases in ways that they are deeply troubled by. And so we see proposals being floated to impeach judges in some instances, to take away their jurisdiction, to dismantle courts altogether and to cut judicial budgets.

And this isn't the first time that we have seen a period of intense anger directed at courts and judges. In fact, it has happened in every generation since the founding of the nation.

And the funny thing about it—not funny; but an important thing happened. Beginning in the 19th century, some of—sometimes Congress did make good on these threats to control or curb the courts in significant ways.

Beginning in the late 19th century, however, something important happened, which was Congress began to think twice about it, that as our constitutional culture matured and Congress and the people it represented began to say you know, this kind of control is inappropriate in an environment where we want our judges to be independent enough and impartial enough to follow the law.

And so these mechanisms of intimidation were abandoned. Does that mean that Congress immediately stopped being concerned about judicial accountability? Not at all. Beginning in the late 19th century Congress began looking at ways to make the judiciary accountable by making it accountable to itself.

The first thing it did in the late 19th century was create a big court of appeals structure, avowedly for the purpose of ending what it called "judicial despotism" by the district courts.

It then went ahead and created the Judicial Conference to let judges govern themselves, the administrative office, to give it administrative control over the judiciary and ultimately, in 1980,

under—with you in Congress, a measure to have judges discipline their own. This is the—the trend that we have seen.

And against that backdrop, I think 5219 is a little bit troubling, more troubling than the other witnesses find it, because it really represents a move away from this century-long tradition where we have entrenched norms, you know, enabling the judiciary to regulate itself, and toward something else, in which we give—take regulatory power away from the judiciary and hand it to an inspector general and, indirectly, we give it to Congress.

Now, this is doubly troubling, it seems to me, because in this context we have a concern that notwithstanding the best intentions of the drafters, this bill can be used to go after the judiciary because of its decisions.

I realize that is not Chairman Sensenbrenner's intention. But if you read the language of the bill, it says quite specifically that it authorizes the inspector general to “conduct investigations of matters pertaining to the judicial branch.”

And it would seem to me that the decisions judges render are within the scope of a matter pertaining to the judicial branch. Now, we can get into legislative parsing, and it is possible that we could read that out of the bill.

But my concern is that in this current environment, where there are some Members of Congress—not in this room, but some Members of Congress—who are interested in using any way they can to retaliate against judges, this bill could be misused for that purpose.

I am even more troubled by the fact that the role the Congress plays in this bill is considerable, that Congress has some say over who is going to be appointed.

It has some say over what is investigated and on what terms, and when the reports are issued, which culminates, I think, in giving Congress the latitude to determine who is being investigated, which adds and opens another door to retaliatory strikes against individual judges.

Now, some can say this is much ado about nothing, that we have inspectors general in the executive branch and they don't have any of these problems. My point here is simply to say this isn't the executive branch.

This is an independent judicial branch that is different from an executive branch agency and where we ought to be a little more concerned about its independence.

More importantly, and I think this is the point I want to—I want to emphasize—unlike the judiciary, the executive branch has weapons at its disposal to make sure that Congress doesn't overreach, that Congress doesn't try to erode the independence of the inspector general.

And indeed, the history of the inspectors general and the executive branch that is, you know, included in a book I recently read from the Brookings Institution is all about Congress and the president jockeying for influence in such a way that the inspector general is preserved in his independence, so that, as one inspector general put it, we straddle a barbed-wire fence between these two branches.

That barbed-wire fence isn't there with the judiciary, which lacks the power to push back if Congress erodes its—if Congress pushes too hard. And as a consequence, I worry about that.

Does that mean we do nothing? No. I think both Professor Rotunda and Professor Hellman have—and you, Chairman, have identified some serious problems that we need to grapple with. The first step I think is to hear what the judiciary has to say about these specific problems.

There are not—it is not just the Breyer commission, but the commission on the judicial branch and the commission on codes of conduct are actively looking at these matters now. If the point is they need to expedite their inquiry, Congress should tell them that. And then at that point, we can decide whether stronger medicine is required. And it may be.

A bill like this may ultimately be necessary, but not now. Thank you.

[The prepared statement of Mr. Geyh follows:]

PREPARED STATEMENT OF CHARLES G. GEYH

My name is Charles G. Geyh. I am a Professor of Law at Indiana University at Bloomington, the author of *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (University of Michigan Press 2006), and coauthor, (with Professors James Alfini, Steven Lubet, and Jeffrey Shaman) of the forthcoming fourth edition of *Judicial Conduct and Ethics* (Lexis Law Publishing 2007). I am currently co-Reporter to the ABA Joint Commission to Revise the Model Code of Judicial Conduct, and previously served as consultant to the National Commission on Judicial Discipline and Removal.

H.R. 5219, the Judicial Transparency and Ethics Enforcement Act of 2006," has a laudable goal: to make the federal judiciary better accountable for its budget and for the ethical transgressions of its judges. Pursuing that goal by creating an inspector general for the federal judiciary, however, is highly problematic for at least two reasons:

- First, inspector general investigations can and likely will be exploited to punish judges for their judicial decisions, statements of bill sponsors to the contrary notwithstanding, thereby jeopardizing core judicial independence norms that Congress has respected for well over a century.
- Second, inspectors general are commonplace within executive branch agencies, but the judiciary is not an agency—it is an independent branch of government. To the extent that inspectors general for executive branch agencies have performed with independence and integrity, it is for reasons that the judicial branch is ill-equipped to replicate, because the judiciary lacks the powers of the executive branch to thwart Congressional intrusions into its inspector general investigations.

Although I have serious reservations about H.R. 5219, the bill serves the salutary purpose of communicating an important message to the judiciary: that Congress is serious about the judiciary's ethical and fiscal responsibilities and that the judiciary should be equally so. Recent events reported in the press signal possible deficiencies in the judiciary's ethics rules and disciplinary framework. The preferred approach is to work cooperatively with the courts to address the concerns that animate H.R. 5219, rather than to impose a potentially problematic solution on an unwilling judiciary. Such a conversation should await the results of three ongoing projects within the judicial branch—Justice Stephen Breyer's Commission on the disciplinary process; the Judicial Branch Committee's study of privately funded seminars, and the Codes of Conduct Committee's review of recusal issues—and take place in the shadow of this bill, giving Congress the leverage it needs to ensure meaningful reform.

BACKGROUND

In the past few years, members of Congress have been highly critical of federal judges and their decisions, and have proposed a variety of reforms calculated to punish "judicial activists" and curb their excesses. Some have proposed to impeach

offending judges.<sup>1</sup> Others have advocated defiance—one bill would deprive the executive branch of the resources to enforce judicial orders in specified cases.<sup>2</sup> One suggested that Congress disestablish uncooperative courts,<sup>3</sup> while another proposed to cut the judiciary's budget to "get their attention,"<sup>4</sup> and many have pressed for legislation to deprive the courts of jurisdiction to hear specific kinds of cases on politically sensitive subjects.<sup>5</sup>

This is not the first time that federal judges have weathered a sustained period of criticism.<sup>6</sup> The first occurred at the turn of the nineteenth century when Thomas Jefferson succeeded John Adams as president and the Jeffersonian Republican Congress dedicated itself to undoing damage they perceived the outgoing Federalists as causing the federal courts, by disestablishing judgeships and impeaching unpopular judges. A generation later, President Andrew Jackson and his supporters in Congress locked horns with the Marshall Court over the supremacy of the Supreme Court's authority to impose its interpretation of the U.S. Constitution on the state and federal governments, and several states openly defied Court orders. Another generation after that, a radical Republican Congress squared off against the Supreme Court in the aftermath of the Civil War over a number of issues pivotal to the Reconstruction agenda, and stripped the Supreme Court of jurisdiction to hear a pending case. Roughly twenty-five years later, near the turn of the twentieth century, congressional populists and progressives advocated a variety of means to restrain the courts from invalidating legislative reforms at the state and federal levels. During the 1930s, an exasperated Franklin Roosevelt invited Congress to pack the Supreme Court with additional justices to thwart the Court's conservative majority that had struck down several New Deal programs. The passage of another generation saw members of the Warren Court targeted for impeachment, and bills introduced to curtail federal court jurisdiction, all or in part because of their liberal-leaning decisions in civil rights and civil liberties cases.

In the 19th Century, Congress sometimes made good on these cyclical threats to impeach errant judges, disestablish their courts, or strip them of jurisdiction. Gradually, however, Congress—and the people it represented—came to appreciate that such threats were antithetical to an emerging Constitutional culture that respected the role independent judges play in American government and that rejected draconian proposals to manipulate the decisions that judges make. Although angry members of Congress have continued to make such proposals every generation or so, they are almost never implemented, as judicial independence norms have become more fully entrenched.

That these heavy-handed means of court control gradually fell into disuse is not to suggest that Congress became indifferent to judicial accountability. Rather, Congress ultimately decided that the best way to balance the needs of judicial independence and accountability was to delegate to the judiciary the authority it needed to be better accountable to itself.<sup>7</sup> And so, in 1891, Congress created the circuit courts of appeals for the express purpose of curbing district court despotism by means of appellate review. In 1922, it created the precursor to the Judicial Conference of the United States, thereby enabling the judiciary to govern itself as a branch; in 1934 it delegated to the courts the power to make their own procedural rules; in 1939, it created the Administrative Office of U.S. Courts, thereby rendering the judiciary accountable for its own budget; and in 1980, it established a system for regulating judicial misconduct in which judges were authorized to discipline their own.

#### H.R. 5219 CAN AND LIKELY WILL BE EXPLOITED TO PUNISH JUDGES FOR THEIR JUDICIAL DECISIONS

At first blush, H.R. 5219 may look like another proposal in keeping with the modern trend toward equipping the judiciary with the tools it needs to make it better accountable to itself, by creating a Chief Justice-appointed inspector general "for the

<sup>1</sup>Ralph Hallow, *Republicans out to Impeach "Activist" Jurists*, WASHINGTON TIMES, March 12, 1997, at A1.

<sup>2</sup>Stephen Dinan, *House Targets Judicial "Errors" With a New Strategy; Votes to Stop Enforcement of Rulings on Pledge, Posting*, WASHINGTON TIMES, July 29, 2003 at A1.

<sup>3</sup>Rick Klein, *DeLay Apologizes for Blaming Federal Judges in Schiavo Case but House Leader Calls for Probe of "Judicial Activism"*, BOSTON GLOBE, April 4, 2005.

<sup>4</sup>Ruth Marcis, *Booting the Bench*, WASHINGTON POST, April 11, 2005.

<sup>5</sup>Alexander Bolton, *Courts May Be Stripped on the Pledge*, THE HILL, September 16, 2004 at 1.

<sup>6</sup>For an elaboration upon these cycles of anti-court sentiment and the emergence of judicial independence norms, see CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 51–113 (2006).

<sup>7</sup>For a discussion of this century-long project to make the judiciary better accountable to itself, see *id.* at 92–110.

judicial branch” who bill sponsors have taken pains to emphasize “will not have any authority or jurisdiction over the substance of a judge’s decisions.” A closer look, however, reveals that notwithstanding the best intentions of its drafters, this legislation could be employed by members of Congress to manipulate judges and their decision-making in patently unacceptable ways.

In evaluating the impact of proposed legislation on the courts, context matters. When President Franklin Roosevelt introduced his Court-packing plan in 1937, it was on the pretext that federal judges were elderly, had fallen behind in their work, and needed additional help. Superficially, then, his was an innocuous plan to improve the efficient operation of the courts. In context, however, this was an Administration furious with Supreme Court decisions invalidating New Deal legislation, and intent on finding a way to get around those decisions, and so—notwithstanding the President’s explanation—the court-packing plan was generally understood as a direct assault on the judiciary’s autonomy. Context matters with H.R. 5219 too. This is not a sympathetic Congress that is looking for ways to help the courts better administer themselves. This is an angry Congress that is dismayed with federal judges generally, with their autonomy, with the outcomes of cases that they have decided, and with the way they run their shop. When, in 2004, Chairman Sensenbrenner addressed the Judicial Conference on the relationship between Congress and the courts, he quite pointedly called attention to two recent disciplinary matters that in his view “raise[] profound questions with respect to whether the Judiciary should continue to enjoy delegated authority to investigate and discipline itself,” adding that “If the Judiciary will not act, Congress will.” The next year, when Chairman Sensenbrenner first elaborated on his proposal to create an inspector general for the judiciary, it was in the context of a speech at Stanford in which he expressed his dismay for “judicial activism” but pronounced impeachment too “extreme” a remedy, before adding in the very next sentence that “[t]his does not mean that judges should not be punished in some capacity for behavior that does not rise to the level of impeachable conduct” and hailing judicial discipline as the appropriate solution. Perhaps Chairman Sensenbrenner did not mean to imply that judicial discipline was an appropriate remedy for “activist” decision-making, but in the larger context of an angry Congress looking for ways to diminish the courts’ autonomy and control judges and their decisions, if H.R. 5219 can be construed to authorize investigations into judicial decision-making, odds are that some members of Congress will seek make it happen.

H.R. 5219 is indeed written broadly and ambiguously enough to authorize inquiries into judicial decision-making:

- Section 1023 authorizes the Inspector General to “conduct investigations of matters pertaining to the Judicial Branch, including possible misconduct in office of judges and proceedings under chapter 16 of this title, that may require oversight or other action within the Judicial Branch or by Congress.” It would certainly seem that a judge’s decisions would fall within the ambit of “matters pertaining to the judicial branch,” unless the “including” clause that follows is intended to limit applicable “matters” to those involving judicial misconduct or proceedings under Chapter 16. While the latter construction is possible, it is strained and odd-seeming, because it would mean that the section conferred a sweeping investigatory mandate in one clause only to take it away in the next.
- Even if pertinent investigations were limited to questions of “misconduct in office by judges,” a judicial decision in which a judge rendered a decision by allegedly disregarding his oath to follow the law and substituting his own personal or political predilections, might well qualify as a form of misconduct. Indeed, Canon 3A of the Code of Conduct for U.S. Judges provides that “A judge should be faithful to and maintain professional competence in the law.” The judge whose decision arguably reflects a lack of competence or fidelity to the law would thus seem to fall within the zone of inquiry. It is possible to limit the construction of section 1023 still further to confine “misconduct in office” to matters actionable under Chapter 16—which calls for the dismissal of complaints related to the merits of judicial decisions. If, however, the objective is to place judicial decision-making clearly outside the scope of inspector general inquiries, the bill should say so with clarity.
- Finally, even assuming that a judge’s decisions are technically outside the scope of section 1023, angry members of Congress may agitate for investigations targeting unpopular judges, ostensibly on the grounds that the judges in question have mismanaged their budgets or engaged in ethical improprieties independent of their decisions. In this context, heightened scrutiny is itself a form of Congressional retaliation.

THE JUDICIARY LACKS THE POWERS OF THE EXECUTIVE BRANCH TO THWART  
CONGRESSIONAL OVERREACHING INTO ITS INSPECTOR GENERAL INVESTIGATIONS.

Proponents of H.R. 5219 have pointed to the success of inspector general programs within administrative agencies as evidence of their potential value within the judiciary. The judiciary, however, is not an administrative agency. It is a separate and independent branch of government—and one that lacks the powers at the executive branch's disposal to resist Congressional overreaching.

H.R. 5219 gives Congress a significant role to play in the workings of the proposed office of inspector general for the federal judiciary. First, under § 1022, the Chief Justice appoints the inspector general “after consultation” with Congressional leaders. Although the Chief Justice’s nominee may not technically require Congressional approval, in the current political climate such approval will be a practical necessity. Second, in § 1023(1), the ambit of the Inspector General’s duties are defined to reach “matters pertaining to the judicial branch . . . that may require oversight or other action . . . by Congress.” Third, § 1025(a)(1) directs the Inspector General to make annual reports to Congress, while § 1025(a)(2) directs the Inspector General to “make prompt reports to . . . Congress on matters that may require action by [it].”

Taken together, these powers would give Congress the leverage to influence who is named Inspector general, which judges are targeted for investigation, what kinds of information the inspector general provides to Congress, and when. When Congress intrudes too far on the prerogatives of inspectors general within the executive branch, the executive branch is well equipped to push back, given the President’s considerable political influence and his veto power in the legislative arena. The history of inspectors general within administrative agencies is thus one of constructive tension between the legislative and executive branches as they jockey for influence.<sup>8</sup>

The judiciary, however, lacks the power to push back, and is thus far more vulnerable to Congressional incursions upon its autonomy, where, as here, the legislation affords Congress so significant a role to play in the inspector general’s operations. The only weapon at the judiciary’s disposal to fend off such incursions is judicial review—which all agree should be used sparingly, and which, if employed in this context, could precipitate a constitutional crisis.

CONCLUSION

H.R. 5219 seeks to address a bona fide problem. Federal judges have come under fire for their attendance at expense-paid seminars, their failure to disqualify themselves from cases in which recusal would seem to be warranted, the absence of ethical standards applicable to the Supreme Court, and the failure of the disciplinary process to call judges to task in cases where it was arguably warranted. For the reasons specified above, H.R. 5219 is an ill-advised solution to these problems that would jeopardize a tradition of restraint in the relationship between courts and Congress that is well over a century in the making. The preferred approach is to await the report of Justice Breyer’s Commission together with the results of related efforts by Judicial Conference Committees on the Judicial Branch and the Codes of Conduct, and then work cooperatively with the Judicial Conference to meet Congress’s remaining concerns. If the judiciary is unwilling to reform itself in the teeth of evidence that further reform is necessary, that may be the time to consider stronger medicine. But not now.

Mr. COBLE. Thank you, Professor Geyh.

Thanks, Professors, all.

Now, we imposed the 5-minute rule against us as well, so we will commence our line of questioning.

Professor Rotunda, this may be a rhetorical question, but I want to get it on the record. Critics argue that the creation of a judicial inspector general is overreaching by Congress and threatens the independence of the third branch. What say you to that?

Mr. ROTUNDA. That is not what this bill proposes. It has got—under the bill, the chief justice appoints the inspector general. The duties of the inspector general are limited. Congress has no role that concerns the inspector general. There is talking back and forth. That can’t possibly be wrong or erode independence.

<sup>8</sup>For a history of inspectors general within the executive branch, see PAUL C. LIGHT, *INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993).

I think efforts by Congress to restrict the courts' jurisdiction, to increase the number of judges on the Supreme Court like FDR's court-packing plan—that erodes judicial independence. This is simply giving a modest amount of judicial accountability.

Mr. COBLE. Professor Hellman, in your testimony you alluded to a gap in the current Federal misconduct statutes. Elaborate a little more in detail on that, A. And is it your belief that the bill before us would close this gap?

Mr. HELLMAN. Thank you, Mr. Chairman. Yes. The gap basically is one that occurs in those situations where the circuit processes have not worked in a specific way, that the—that there—there is an issue that should have been heard, an allegation of misconduct that should have been heard by a special committee because there are issues of fact that are open to dispute. The statute as amended in 1980—amended in 2002 requires that.

If that happens, if the chief judge of the circuit doesn't appoint a special committee, even though he or she should, and if the circuit council ratifies that by dismissing the complaint, there is no appeal to the circuit conference.

The circuit—five members of the panel were frustrated that—the three dissenters more than the two in the majority, who thought there was just nothing they could do.

This bill can be used to fill that gap. I think it has to be written a little bit more carefully to do that, but it can make clear that there is a channel of review for those cases, and I think that will give the people substantially more confidence in the process.

Mr. COBLE. Thank you, sir.

Professor Geyh, how will a judicial inspector general be exploited to punish judges in their judicial decisions, if, in fact, they will be exploited, A? And B, cannot Members of Congress currently file complaints alleging judicial misconduct under the 1980 act?

Mr. GEYH. Fair questions, Mr. Chairman. I think the first point is that the bill itself says the inspector general can conduct investigations of matters pertaining to the judicial branch.

That means that if an angry Member of Congress says I don't like this particular decision, that would be a matter falling within the judicial branch.

More specifically, though, let's even limit it to the qualifying clause that it deals with issues of misconduct. Canon 3A of the Code of Conduct for United States judges says judges must be faithful to the law.

If a Member of Congress says this judge is an activist judge who has disregarded the law, we now ought to investigate that as a violation of Canon 3A, and that is a form of misconduct that will properly fall within the scope of this bill. That is what worries me.

Even if that is avoided, I think the larger problem is that if there is a decision that Members of Congress don't like, you can target that judge for an investigation, irrespective of whether you are going after his decisions.

You can say this judge decided case X in Y way, we now want to have it investigated because we think he is mismanaging his budget or because his ethical transgressions in other cases are worthy of investigation.



It is true that Congress can now file complaints, but this gives the Congress a formal avenue with which to go to the inspector general and start directing the inspector general to be conducting investigations of particular kinds.

That doesn't happen in the executive branch. I worry, however, that the judicial branch is really going to have trouble preserving the independence of the inspector general under circumstances in which, unlike presidents, you don't have that kind of authority to what I call push back.

Mr. COBLE. Before the red light appears, Professor Rotunda, your body language tells me you want to insert your oars into these waters for rebuttal, so I will recognize you.

Mr. ROTUNDA. I am Italian. I have to talk with my hands, not just my mouth. [Laughter.]

But if you look at—I mean, I disagree with Professor Geyh's interpretation of the statute, the proposed statute.

Section 1023 under the duties—the duties are not to conduct investigations of matters pertaining to the judicial branch. It says conduct investigations of matters pertaining to the judicial branch that may require oversight or other action within the judicial branch or by Congress.

The inspector general could find a problem with the judiciary that needs a statutory solution and officially tell Congress about it. That is—that is a useful but not earth-shaking reform.

The inspector general could—sadly, this happens—find a situation where Congress has to impeach, propose impeachment. That has been done before. It has been done once in the last several decades, and hopefully never again.

These are very modest—it is not just to conduct investigations of the judicial branch. It is that requires oversight or other action within the judicial branch that you tell—you tell the chief justice or that requires a statutory solution. That is very modest.

Mr. COBLE. Well, I thank you, sir.

My time has expired.

The distinguished gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, the thing that concerns me is the congressional involvement in the selection of the I.G.

What would the reaction be if some other branch of Government had a say in who the congressional I.G. would be? Say the President could help select such a person, or the judicial branch could help—such a person.

What would—Mr. Geyh, what would you think the reaction would be?

Mr. GEYH. Well, my—my impression is that—that there—Congress has a significant interest in preserving its own autonomy, and that if there were some interest in other branches dictating who the appointees of that branch were, it would not be well received.

I think that is an understandable reaction, which is part of the reason why I don't say so in my testimony, but I would have no aversion to Congress authorizing the judiciary to create an inspector general.

And I should add, by the way, that—and this is just as an aside—there is no provision in this bill for the removal of inspectors general, and that worries me a little bit. Who has that power and under what circumstance?

It seems to me that if this bill goes forward, at a minimum there ought to be something in there about—about removal.

Mr. SCOTT. I would ask either Mr. Rotunda or Mr. Hellman, where is it in the bill that prohibits the I.G. from reviewing and commenting on and reporting on the compliance with precedents in actual opinions that are written?

Mr. ROTUNDA. There is—there is—there is no authority for them to do that anywhere in the—in the proposed statute. I mean—

Mr. SCOTT. Well, it says—

Mr. ROTUNDA. —if you look at—duties under 1023, looking at now—

Mr. SCOTT. Wait, wait. Let me—let me—let me—let me read—

Mr. ROTUNDA. Yes.

Mr. SCOTT. —make an annual report to the chief justice and the Congress relating to activities of the office and make prompt reports to the chief justice and Congress on matters that may require action by them.

That would certainly cover opinions. We might have to take action if they have an opinion that a law was unconstitutional.

Mr. ROTUNDA. Congressman Sensenbrenner has already publicly stated that the purpose—

Mr. SCOTT. Well, I—

Mr. ROTUNDA. No, I mean, I think we can clear up the statutory language.

Mr. SCOTT. Okay.

Mr. ROTUNDA. I thought—

Mr. SCOTT. But it is not—it is not in the bill—

Mr. ROTUNDA. Well, I thought—

Mr. SCOTT. —as you read it.

Mr. ROTUNDA. I thought it was limited under section 1023(1) but I certainly have no objection to making the bill more clear.

Mr. SCOTT. Okay. Do you see—it would have to be made clear that we are not talking about their opinions? Or are we talking about their opinions?

Most of the complaints from this Committee come from the opinions, not from—and yesterday we were talking about limiting jurisdiction of the Federal courts because we didn't like what they might potentially decide.

Mr. HELLMAN. May I just add—

Mr. SCOTT. Now we are talking about impeaching judges who don't rule the way we want. I mean, we have had a lot of complaints from this Committee.

Mr. HELLMAN. May I just add briefly, I would very much like to see that made explicit in the bill. I think the—Chairman Sensenbrenner has said that very emphatically.

But there will be people who will read this in the light that you and others have, and it seems to me the sensible thing to do is to make that explicit and strong in the bill.

Mr. SCOTT. Okay. Let me ask another question. What is the purpose of consulting with congressional leaders? Mr. Geyh suggested

that there is nothing inherently wrong with an I.G., but what is the deal about consulting with partisan congressional leaders as to who it ought to be?

Mr. ROTUNDA. When Congress urged the president to appoint a special prosecutor against Richard Nixon after Archibald Cox resigned, the attorney general put in the regulation that it would—they would appoint a special prosecutor after consultation with senior leaders of the House and Senate Judiciary Committees.

I don't think there is anything unconstitutional about that, as long as the House and Senate don't—aren't the ones appointing, because they have no appointing authority under our Constitution. I thought it was a matter of kind of comity. I don't think it is essential to the bill.

But it is not unconstitutional to talk. It is a free country.

Mr. SCOTT. Well, yes, but to require the consultation, you have to assume that it is going to have some influence on the selection. Wouldn't the—if you can influence the selection of who the I.G. is going to be, aren't you kind of influencing which judges are going to be the ones investigated?

Mr. ROTUNDA. Well, advice is persuasive if it is wise. I think—

Mr. SCOTT. Or if it is coercive.

Mr. ROTUNDA. I don't know how you are going to coerce the chief justice. What can you do? I mean, what can you do to him, really? So—

Mr. SCOTT. What should you do to him, I guess, would be another—my time is just about up.

Let me ask one final question. I don't see—maybe I didn't read it carefully. Is there subpoena power for this I.G. in here?

Mr. ROTUNDA. I believe there is.

Mr. HELLMAN. Yes, it is.

Mr. SCOTT. There is?

Mr. HELLMAN. Section 1024.

Mr. SCOTT. Ten twenty-four?

Mr. ROTUNDA. Twenty-four three.

Mr. SCOTT. Okay.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Scott.

The distinguished gentleman from Ohio, Mr. Chabot?

Mr. CHABOT. Thank you, Mr. Chairman. I have no questions at this time. I want to thank you for holding this hearing, however.

Mr. COBLE. I thank you, sir.

The distinguished gentleman from Massachusetts, Mr. Delahunt?

Mr. DELAHUNT. Thank you, Mr. Chairman.

This bill does not carry any criminal sanctions.

Mr. ROTUNDA. No.

Mr. DELAHUNT. I guess my query is to the chair, who is on his way out, but what is this bill doing here?

Mr. Chabot, maybe you can answer that.

Mr. CHABOT. No, Mr. Chabot can't answer that. I just got here a few minutes ago.

Mr. DELAHUNT. Okay.

Mr. CHABOT. I was in another hearing, and I am just holding the chair. I am sure when Mr. Coble gets back here he will be able to fully satisfy your questions.

Mr. DELAHUNT. No, I mean, it——

Mr. SCOTT. If the gentleman would yield——

Mr. DELAHUNT. Sure.

Mr. SCOTT. —I made a similar inquiry earlier, and——

Mr. DELAHUNT. Am I at the right Subcommittee? Is this the Subcommittee on Crime? [Laughter.]

Mr. SCOTT. The answer was essentially that the bill is here.

Mr. DELAHUNT. Okay. You know, I agree. I think there is really a consensus from what I am hearing from academia as represented by the three that language can be cleaned up. You know, the appointment power can eliminate the consultative process, and we can be clear as to the I.G. not being implicated into rendering opinions on opinions, what have you.

I think it was you, Professor Hellman, that talked—or maybe it was you, Professor Rotunda, that was talking about is the sky falling. I am just uncertain as to the magnitude of the perceived problem.

I think it was you, Professor Hellman, that talked about, you know, erosion of the confidence of the American people in the system. Well, I don't believe that is something that most Americans wake up in the morning and are concerned about.

And I am not trying to minimize the fact that there might be an issue there. But I guess where I am coming down is the Breyer Committee—at least it is my understanding—is going to issue a report some time in the fall. I can assure you that this particular Committee will not be in a position to respond before that.

But I would like to hear from representatives of the Judicial Conference as to, first of all, the need, and then their perspective and view as to what is necessary in terms of meeting that need and what kind of a mechanism.

Professor?

Mr. HELLMAN. Thank you, Mr. Delahunt. I have two quick responses to that. No, I don't think the sky is falling either way, actually. But the—and it is certainly true that people don't wake up in the morning thinking oh, my God, the independent judiciary is doing all these terrible things, and we have to do something about it.

But I do think there can be a subtle erosion of confidence, and one of the reasons it can be a problem today perhaps more than in the past is the amplifying effect of the media. We have talk radio raising an issue, and then it gets talked about in the blogs, and then the talk radio gets it again.

There are Web sites devoted to pursuing judges for alleged misconduct.

Mr. DELAHUNT. Judicial Watch, et cetera. I don't disagree with that, and I think that actually many of us in—some of us in Congress are responsible for that, because I think it was you, Professor Geyh, that talked about, you know, the term “activist judges”—of course, that is—so much depends on the perspective of the individual that—the perspective of what activism is.

But this is not going to solve that issue.

Mr. HELLMAN. No, it is not going to solve that issue.

Mr. DELAHUNT. And I don't even think it will impact it whatsoever.

Mr. HELLMAN. Well, that in a way was my second point, which is that I regard this, as Professor Rotunda does, as a relatively modest measure. But the other thing—I think you are absolutely right about your larger point, which is that there has been an escalation of rhetoric.

And I think it has been on both sides, where you have one side looking at a—saying not just this is a bad decision, but this is judicial activism run amok, and then on the other side you have people saying this is—not just this is a bad piece of legislation—

Mr. DELAHUNT. No, I—

Mr. HELLMAN. —the judiciary.

Mr. DELAHUNT. We are totally in agreement. I thought what was interesting last night—in fact, I was discussing this earlier today with my friend and colleague from Virginia—was a recent Supreme Court decision relative to the no-knock issue.

And I noted that some of my colleagues on this side were supporting legislation which would limit—would impose limitations on funding for—pursuant to that particular decision.

So while I would suggest that in the course of the past 4 years or 5 years we have been hearing from the more conservative Members of Congress about their unhappiness with what they perceive to be liberal activist judges, clearly it will go the other way presumably with the advent of the Roberts court.

And I just am one who believes in the most profound protection for the independence of the judiciary even if I happen to disagree with a particular opinion. That is just an unsolicited observation.

Mr. COBLE. I thank the gentleman from Massachusetts.

And I think Mr. Scott has one more question to put to the panel.

Mr. SCOTT. I just wanted to ask Mr. Geyh—you mentioned the authorization of an I.G. as one thing that could be done. Are there other things that could be done?

Mr. GEYH. Well, the one thing that I would suggest is that virtually every State in the United States links their disciplinary process—their judiciaries do—to their code of conduct.

And the confusion that surrounds a lot of these cases, where you have got recusal problems or a pro se litigation problem—not pro se litigation, excuse me; ex parte communications—can be resolved if you just link the two.

I mean, I find, in other words, that you have this elaborate code that tells us when it is inappropriate to engage in ex parte contacts, when it is inappropriate to disqualify.

And there is—the Federal judiciary is alone among judiciaries in not linking those two. I think one way to deal with that is to amend, you know, the statute to instead of saying judges should be disciplined for engaging in conduct that is contrary to the administration of justice, this vague standard that is currently there, to linking it to conduct that violates their—the code of judicial conduct that they already have in place.

Mr. COBLE. I thank the gentleman.

In my opening statement, gentlemen, I—alluding to the previous hearing that was mentioned earlier, I said we learned from that hearing that the complaint process was largely unpublicized and that transparency issues persisted.

I should have said and that a lack of transparency issues persisted, just for the record.

We appreciate very much, gentlemen, your contribution today. The Subcommittee will benefit from this, I am confident. In order to ensure a full record and adequate consideration of this important issue, the record will be left open for additional submissions for 7 days.

Also, any written question that a Member wants to submit should be submitted within the 7-day period.

Did you have something, Bobby?

Mr. SCOTT. Yes, I would like a letter from the Judicial Conference of the United States—we didn't invite them, but they did submit a letter to you, a copy to me, and I would like this part of the record.

Mr. COBLE. Without objection, it will be made a part of the record.

[The letter follows in the Appendix.]

Mr. COBLE. And this concludes the legislative hearing on H.R. 5219, the Judicial Transparency and Ethics Enhancement Act of 2006. Thank you for your cooperation and attendance.

And the Subcommittee stands adjourned.

[Whereupon, at 12:39 p.m., the Subcommittee was adjourned.]

## A P P E N D I X

---

### MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Mr. Chairman. I'm pleased to join you in convening this hearing on H.R. 5219, the "Judicial Transparency and Ethics Enhancement Act of 2006."

I am in favor of Congress conducting regular oversight over the administrative operations of the courts through reports, hearings, and avenues of communication. And I'm in favor of the Congress authorizing, not requiring, the Judicial Conference to appoint an inspector general or other such official, to assist it in its efforts to reign in judges who don't follow the rules, and to develop reports to be sent to Congress and elsewhere the Conference might direct. But I am not in favor of the Congress requiring the appointment of a Judiciary IG in whose appointment it has a say and who reports to Congress as directed or required by Congress. I believe that such a congressionally influenced position would clearly offend traditional notions of separation of powers and comity between the Legislative and Judiciary Branches. Moreover, I believe the creation of such a position is unnecessary.

If we are dissatisfied with the way the Judiciary is addressing judicial discipline and other matters, we should notify Chief Justice Roberts as you and Ranking Member Berman did with Chief Justice Rehnquist when you were Chairman of the Courts Subcommittee, Mr. Chairman, and give Chief Justice Roberts a chance to respond to us. Granted, the reports of judges taking, and not reporting, lavish, privately financed trips, and of judges not reporting conflicts of interest as required, as well as failing to recuse themselves as appropriate, are disturbing. While these matters require the Judicial Conference's attention as well as our oversight attention, there are a number of approaches available to the Congress to satisfy itself that these issues are being appropriately addressed by the Judiciary, short of establishing a Congressionally directed Judiciary Inspector General. There is evidence the Judicial Conference is addressing the issues, including the indications in its letter to us dated yesterday. If more specific information is desired, perhaps a letter to the Chief Justice requesting an update on the Conference's progress toward addressing the issues and problems we are hearing about would be appropriate.

The Judicial Branch is certainly not the only branch with disturbing reports of inappropriate privately financed trips and conflicts of interest, and worse. There continues to be a number of such reports regarding members of Congress, despite actions taken by the Congress over the years to address the problems, including establishing an Inspector General. While the Congress has an oversight responsibility to see to it that the public resources it makes available to the other branches are expended in a publicly accountable and proper manner, oversight of the ethics of individual employees of those branches is better left to the branches, short of the necessity for use of Congress' impeachment powers.

With these reservations, Mr. Chairman, I look forward to the testimony of our witnesses for their insight on the issues raised by H.R. 5219. Thank you.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE  
ON THE JUDICIARY

STATEMENT OF REP. JOHN CONYERS, JR.  
Legislative Hearing on H.R. 5219, the "Judicial Transparency  
and Ethics Enhancement Act of 2006"  
June 29, 2006

Once again, this Committee is considering legislation that attacks the independence of the judiciary. Despite the fact that the nation's founders meant for the judiciary to be free of partisan pressure and immune from political whims, the Bush Administration and Republican Congress have pushed measures that subject courts to excessive oversight and strip them of their powers.

This legislation creates an inspector general for the judiciary, authorizing the inspector general with subpoena power to investigate misconduct by any federal judge and recommend action by Congress or the Justice Department. The inspector general also would be empowered to recommend changes to laws affecting the federal judiciary.

This legislation is unwise. For the first time, an extra-judicial body would oversee the courts. Under the current regime, the courts themselves review allegations of misconduct and forward evidence of impeachable offenses to the House Judiciary Committee. In addition, currently, if congressional proponents of an inspector general believe that serious abuses are occurring in the judiciary, they can hold open investigations.

No such congressional inquiries have been held. This is telling of the motivation behind the legislation – it appears that an inspector general has been proposed as a means of intimidating judges into political compliance. Unfortunately, this would not be the first of such attempts, and I regret to say that it probably will not be the last.



LETTER TO THE HONORABLE HOWARD COBLE FROM LEONIDAS RALPH MECHAM,  
SECRETARY, JUDICIAL CONFERENCE OF THE UNITED STATES



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

LEONIDAS RALPH MECHAM  
*Secretary*

June 28, 2006

Honorable Howard Coble  
Chairman  
Subcommittee on Crime, Terrorism,  
and Homeland Security  
Committee on the Judiciary  
207 Cannon House Office Building  
United States House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

I write to express the views of the Judicial Conference on HR. 5219, the Judicial Transparency and Ethics Enhancement Act of 2006, a bill that would impose an Inspector General (IG) upon the judicial branch of government. A hearing on this bill has been scheduled for June 29, 2006. The Judicial Conference was not invited to testify on this legislation. We nonetheless ask that you consider our views and include this letter in the hearing record.

The proposal to create an IG is an entirely unnecessary and inappropriate imposition of control over the judiciary that creates precedents for further erosion of the fundamental constitutional principle of separation of powers. The Judicial Conference strongly opposes this bill and any other legislation creating an IG in the judicial branch because: (1) it threatens the independence of judicial decision-making, and has serious implications for the separation of powers; and (2) rigorous and effective systems and mechanisms for audit, review, and investigation currently exist in the judiciary, making the legislation duplicative, intrusive, and unnecessary.

For more than 200 years, the integrity of the American system of justice has relied on the foundation of judicial independence, that is, judicial decision-making based upon

The Honorable Howard Coble  
Page 2

the law and the Constitution, fairness of process, and freedom from political intrusion. The idea of an independent judiciary as defined by the framers of the Constitution has proven its enduring virtue through many challenges over time. The judiciary maintains high ethical standards, and we take seriously our responsibility to ensure the appropriate and efficient use of public funds in a manner that would not undermine the historically high degree of confidence that the American people have in the federal court system. To this end, the judiciary has put in place increasingly rigorous and effective systems and mechanisms for review that do not undermine the independence of federal judges to render impartial decisions. Indeed, the judicial branch is currently reviewing its extensive, overlapping network of ethics protections to make them even more effective.

#### Fundamental Principles of Democracy

The proposed IG would have very broad authority to “investigate matters pertaining to the judicial branch.” We are very concerned that the legislation bestows on an IG the power to become involved in judicial functions such as case assignment and case management practices, case disposition, and sentencing practices. Even more alarming, the IG could, perhaps with Congressional prompting, target particular judges based upon their rulings, and would have the power to subpoena records or testimony.

The IG’s extraordinary powers could easily be used to influence, intimidate, or punish particular judges - especially for unpopular decisions. The judicial branch is particularly vulnerable to this kind of intimidation because the judiciary has no direct role in the legislative process – unlike the executive branch which has the ability to fight or influence legislation that it opposes through legislative tools like the veto. The judiciary has no such leverage. Investigations of judges could become a highly politicized process.

In these ways, this IG proposal would be detrimental to the separation of powers, to the judiciary’s ability to sustain the public’s trust in its essential non-partisan nature and its independent purpose to sustain the rule of law. These fundamental principles of democracy should not be undermined when other means are available in the name of combating waste, fraud and abuse within the judicial branch.

We note that Congress apparently views its unique constitutional role similarly. Indeed, many have alleged that Congress’ existing ethics procedures have been undermined by partisanship. For example, George Mason University Public Policy Professor Susan Tolchin, in her book, *Glass Houses: Congressional Ethics and the*

The Honorable Howard Coble  
Page 3

*Politics of Venom*, analyzed the politicalization of the ethics process and argues that the Congressional ethics process has been transformed into a partisan political tool feared by Members on both sides of the aisle. Perhaps because of these considerations, there is no IG in the Senate. And while the House of Representatives does have such an office, the jurisdiction of the IG is limited solely to administrative matters and is precluded from involvement in ethical or legislative matters, a narrow range of oversight maintained in deference to the constitutional functions of the legislative branch.

#### A Duplicative, Wasteful Intrusion

An IG would be an unnecessary, intrusive and wasteful duplication of the extensive management and oversight efforts already conducted by the Judicial Conference of the United States and its committees, the Administrative Office of the U.S. Courts (AO), the judicial councils of the circuits, the United States Sentencing Commission, the Federal Judicial Center, and the federal courts themselves. The judiciary has in place a system of oversight to promote stewardship of resources, effective program management, and integrity of operations. This system includes the AO Office of Audit, circuit judicial councils, the AO Office of Management Planning and Assessment, and independent audits by outside CPA firms. Through these established mechanisms, the judiciary:

- Addresses allegations of judicial misconduct or disability and identifies, investigates and resolves allegations of fraud, waste, loss, or abuse;
- Performs extensive cyclical audits of the courts and audits of judiciary funds, programs and systems in conformity with government auditing standards;
- Oversees the judiciary's programs and operations; surveys the condition of business in the courts; and reports to the public on the courts' caseloads and judicial activities;
- Promotes uniformity of management procedures and the expeditious conduct of court business; studies the operation and effect of the general rules of practice and procedure; and promulgates guidelines and carries out efforts to achieve fiscal responsibility, accountability, and efficiency; and
- Calls upon independent outside experts to review specific areas of concern to obtain objective analyses and recommendations for actions.

The Honorable Howard Coble  
Page 4

As for allegations of judicial misconduct, just as the House and Senate handle ethical issues with self-regulating policies and through Congressional committees, the judicial branch addresses judicial ethics issues with policies and through committees of federal judges.

The Judicial Conduct and Disability Act Study Committee, impaneled by the late Chief Justice Rehnquist and chaired by Justice Breyer, was created to make a comprehensive study of the act governing judicial conduct and its administration, with a final report to Chief Justice Roberts expected in September.

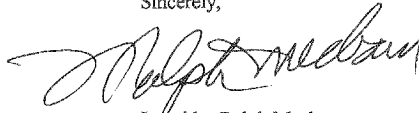
In addition to creating the Judicial Conduct and Disability Act Study Committee, the judicial branch has taken other steps to address its handling of judicial conduct and ethics issues. These actions include:

- The Chair of the Executive Committee issued a memorandum dated April 27, 2006, to all United States judges, strongly urging strict adherence to ethical obligations.
- The Judicial Conference Committee on the Judicial Branch has a task force studying the issue of judges' private seminar attendance, in consultation with two other Conference committees. This study is expected to lead to policy recommendations to the Judicial Conference.
- The Chair of the Judicial Conference Committee on Financial Disclosure issued a recent memorandum to all judges reiterating the requirement to disclose seminar attendance on financial disclosure reports and urging judges who have not been in compliance with this reporting requirement to file amended reports now for past years.
- The Judicial Conference Executive Committee has asked the Committee on Codes of Conduct to undertake further ethics training for judges in addition to the substantial training programs on this subject already being conducted.
- The judiciary is improving its automated case management system's conflict identification capabilities and is promoting the utilization of this computer program by all federal courts.

The Honorable Howard Coble  
Page 5

In closing, let me emphasize once again that the independence of the three branches of government is vital to our democracy. Imposing an IG on the judiciary – especially one whose selection must be made in consultation with the Congress and who would report directly to the Congress – would violate this basic principle.

Sincerely,

A handwritten signature in black ink, appearing to read "Leonidas Ralph Mecham". The signature is fluid and cursive, with the first name "Leonidas" being more prominent and the last name "Mecham" following in a similar style.

Leonidas Ralph Mecham  
Secretary

cc: Honorable Robert C. Scott  
Ranking Member